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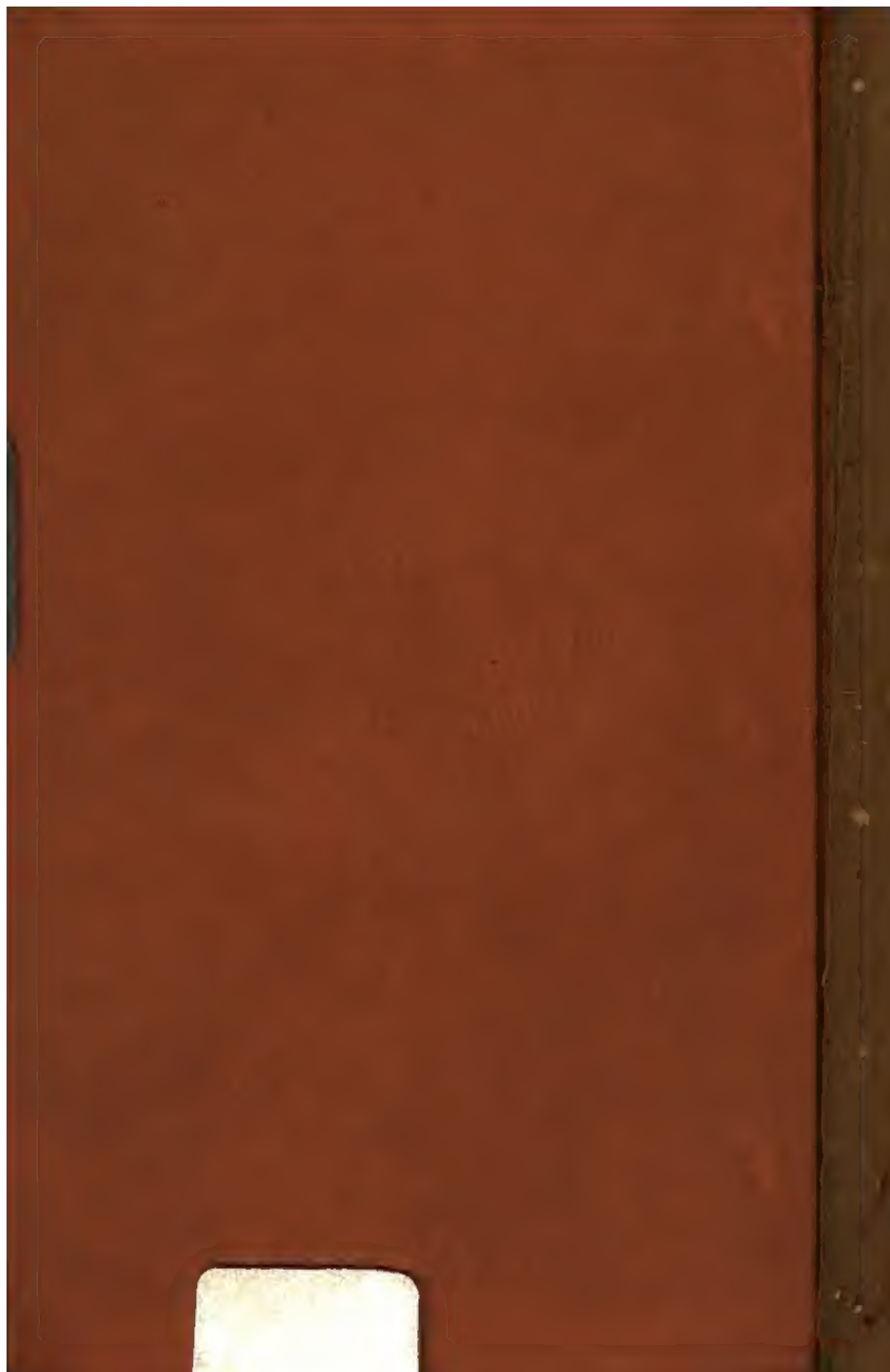
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REPORTS OF CASES

IN

CRIMINAL LAW,

ARGUED AND DETERMINED

IN ALL THE COURTS IN ENGLAND AND IRELAND

EDITED BY

EDWARD W. COX, ESQ., OF THE MIDDLE TEMPLE,
Serjeant-at-Law.

VOL. XII.

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REPORTERS.

CRIMINAL APPEAL CASES, before all the Judges, by **JOHN THOMSON, Esq.** ;
CENTRAL CRIMINAL COURT, by **W. F. FINLASON, Esq.** ;
NORTHERN CIRCUIT, by **H. THURLOW, Esq.** ;
OXFORD CIRCUIT, by **JOHN ROSE, Esq.** ;
HOME CIRCUIT, by **W. F. FINLASON, Esq.** ;
NORFOLK CIRCUIT, by **J. W. COOPER, Esq.** ;
WESTERN CIRCUIT, by **T. W. SAUNDERS, Esq.** ;
MIDLAND CIRCUIT, by **H. F. POOLEY, Esq.** ;
SOUTH WALES CIRCUIT, by **E. JULYAN DUNN, Esq.** ;
IRELAND, by **W. MULHOLLANN, Esq.** ;

Barristers-at-Law.

REPORTS
OF
Criminal Law Cases.

HOME CIRCUIT.

SUSSEX SPRING ASSIZES, 1871. .

Lewes, March 25.

(Before Lord Chief Justice COCKBURN.)

REG. v. REED AND OTHERS.(a)

Indecency—Bathing near a public footway—Usage to bathe at such a place.

It is unlawful for men to bathe, without any screen or covering, so near to a public footway frequented by females that exposure of their persons must necessarily occur; and they who so bathe are liable to an indictment for indecency. Nor is it any defence to such an indictment that there has been, as long as living memory extends, an usage so to bathe at the place, and that there has been no exposure beyond what is necessarily incident to such bathing.

THE indictment stated that the defendants did unlawfully and indecently expose their bodies and persons naked and uncovered in presence of divers of Her Majesty's subjects, to their great scandal, and to the manifest corruption of their morals; and, second count, that the defendants on a certain public and common highway, in the parish of Appledown, unlawfully and indecently did expose their bodies and persons naked and uncovered in the presence of divers subjects then and there being, and within sight and view of divers others passing and repassing in the highway, to the common nuisance of the subjects of the Queen.

The defendants pleaded not guilty.

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

REG.
v.
REED.
—
1871.
—
*Indecent
exposure—
Bathing near
footway.*

Hawkins, Q.C., and *Grantham* for the prosecution.

Willoughby and *A. L. Smith* for the defendants.

Hawkins, in opening the case, cited *Rex v. Crowdon* (2 Camp. N. P. C. 89), where a defendant was convicted of indecency in bathing at Brighton in view of houses recently erected. Although in the present case it was not alleged that the bathing was within view of the houses, it was urged that, as it was on a public pathway, it was the same case in point of principle.

It appeared that the bathing took place in the sea, at a spot about two miles from Chichester, and half a mile from the nearest dwelling-house, at the mouth of the Lavant, a stream flowing from Chichester and where the water was deeper than elsewhere on that part of the coast. The bathing-place was on a public footway from Chichester, on a bank or sea-wall along the beach. The side of the bank next to the sea, as it was a sea-wall, was not accessible as a place for dressing and undressing, and so the bathers dressed and undressed on the land side of the path. Hence they passed naked to and from the sea across the path; and it was proved that as many as eighteen or twenty women passed along the footpath in the course of a day, and that sometimes they had to turn back in order to avoid the bathers. The bathing took place, not merely in the morning and evening, but in the afternoon, at the time women were walking along the path. Moreover, as the bank was five or six feet high, the bathers, when on the path, were seen at some distance.

It was proved that bathing went on at the time women were passing, and that sometimes they had to turn back. The pathway was, it was stated, one of the most pleasant walks round Chichester, and a good deal frequented by ladies, especially in that season of the year when bathing went on, and the prosecutor, Mr. Stanford, whose house was within half a mile of the bathing-place, stated that the bathers could be seen from some of the windows of his house and from his garden. But it did not appear that complaints had been made until the prosecutor purchased the house about two years ago, and it also appeared that there was another house nearer than his, and that the inhabitants did not complain, the nearest house being above a quarter of a mile from the bathing-place. Further, it appeared that for more than half a century bathing had taken place there without any complaint, and that there had not been on the part of any of the defendants any exposure beyond what was necessarily incident to bathing. Nevertheless, it appeared that the pathway from which the bathing took place was one of the most pleasant walks in the neighbourhood of Chichester, and that it was practically closed to females during the bathing season, which was, of course, the finest portion of the year.

COCKBURN, C.J.—If the place where the bathing went on was a place where persons could not bathe without indecent exposure, it was a place where bathing ought not to go on. Undoubtedly, if it was a place where people rarely passed, and where there

was no necessity for passing at all, it would be a material element in the case. But the mere fact that bathing could not go on in the place without exposure was not enough to excuse the exposure, and was rather a reason why the bathing ought not to go on. Upon these facts it was quite impossible that the defendants could resist a conviction upon this indictment. There was, it appeared, a public footway frequented in fine weather by the inhabitants of Chichester, and which must be taken to be an ancient and accustomed footway. It was impossible to set up a customary right to bathe close to the path in such a way as to violate public decency, and thus to be inconsistent with the use of the footway by any of the Queen's subjects, especially of the female sex. No one could suppose that respectable women could frequent the footpath where men were in the habit of bathing and were constantly seen in a state of nudity. It was clear, therefore, that the usage so to bathe, however long it might have existed, could not be upheld, and that those persons who thus exposed themselves upon or near to a public footway were liable to be indicted for indecency. There must, if the prosecution was pressed, be a verdict of guilty upon this indictment, unless the facts as thus shown in evidence could be altered.

It was not suggested for the defence that the facts could be altered.

Hawkins, for the prosecution, stated that it was not desired to press the prosecution, if protection for the future could be secured, and thereupon it was agreed between the parties that bathing henceforth should take place from a shed to be erected for the purpose, and on this condition the jury were discharged.

REG.
v.
REED.
—
1871.
—
*Indecent
exposure—
Bathing near
footway.*

HOME CIRCUIT.

Hertford, March 2, 1871.

(Before Mr. Justice HANNEN.)

REG. v. CHAPMAN.(a)

*Murder—Resistance of arrest under warrant for misdemeanor—
Necessity for possession of the warrant by the officer.**In order to justify an arrest, even by an officer, under a warrant, for a mere misdemeanor, it is necessary that he should have the warrant with him at the time. Therefore, in a case where the officer, although he had seen the warrant, had it not with him at the time and it did not appear that the party knew of it :**Held, that the arrest was not lawful.**And the person against whom the warrant was issued resisting his apprehension and killing the officer,**Held, that it was not murder; and the prisoner was convicted of manslaughter only.***MURDER.**—The prisoner was indicted for the murder of one Snow, on the 10th of January last.*Clark and Walker for the prosecution.**Woollett and Croome for the prisoner.*

In October, 1865, an information issued against the prisoner at Bennington, in Hertfordshire, for an offence against the Game Laws; and as he did not appear, a warrant was issued against him, directed in the usual form to "all peace officers." He had absconded and resided in Middlesex, until in January last he returned to Bennington, the place of his former residence, where the deceased, a police officer, who had only been three or four years in the service, was stationed. In the meantime the officer, in common with the other officers of the county force of the district, had received instructions to arrest the prisoner whenever they could find him, and the warrant was shown to him and the others. It did not appear, however, that the officer knew the person of the prisoner, or that the latter knew of the warrant, or that he knew the officer, and indeed the contrary rather appeared.

On the 10th of January the prisoner was walking in the

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law

neighbourhood of Bennington, with the pieces of a gun, which could so be divided and put together for use, in the pockets of his jacket, where the marks of them could be seen. He met a boy, of whom he asked the way, and who saw the marks of the pieces of the gun in his pockets. Shortly afterwards the boy heard a gun go off, and soon after the prisoner rejoined him, and then left him. As he was going, the boy saw Snow, the deceased, coming towards them, and said to the prisoner, "There is Mr. Snow coming!" to which the prisoner answered, as he was going, "Oh, is he?" The deceased followed him, and the boy, looking back, saw him put his hand upon the prisoner's jacket, near the pocket. The boy saw no more, and left the spot. Shortly afterwards the deceased was seen to stagger home, and soon died from the effects of the fracture of the skull produced by two blows, apparently with the butt end of a gun, or some similar weapon. At the spot where the boy saw the two men together, there were marks of a struggle; and at another spot some sixty yards off marks of a still more severe struggle; and from this latter spot there were tracks of a man running away. No one else was near the spot, and there was no doubt that the prisoner had inflicted the blows. The pieces of a gun was found in his possession, and when he was charged he said, "I did not kill the man."

The case for the prosecution rested throughout upon the theory of an attempt to arrest the prisoner on the warrant, and of resistance to the arrest; but it appeared that the deceased had not the warrant with him at the time, nor had he ever had it in his possession, though he had once seen it. Nor was there any evidence that he had any knowledge of the person of the prisoner, or that he intended to arrest him under the warrant.

Woollett, for the prisoner, submitted that the attempt to arrest the prisoner under the warrant was not lawful, as the officer had not the warrant at the time, and cited *Galliard v. Laxton* (31 L. J. 123, M. C.).

Clark, for the prosecution, submitted that the instructions of the officer's superiors, and the existence of the warrant, which he had seen, justified the attempt to arrest.

HANNEN, J., held otherwise; and, on the authority of the case cited, ruled that the attempt to arrest under the warrant could not be justified.

Clark then relied on the Poaching Prevention Act (25 & 26 Vict. c. 114), s. 2; but

HANNEN, J., ruled that, as the whole case for the prosecution had been conducted upon the ground of an attempt to arrest under the warrant, the case could not now be put upon a different footing.

Woollett, for the prisoner, then went to the jury, submitting that as it was ruled that the attempt to arrest him was illegal, he was entitled to resist it, and in so doing to inflict any violence that might be necessary; so that, unless he had inflicted violence

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not necessary for that object, he was entitled to an absolute acquittal. And, to show that there was no violence greater than was necessary, he urged the circumstances that there were two struggles and only two blows; and that the conduct and expressions of the prisoner showed that he had no intention of killing the officer, and no idea that he had inflicted mortal injuries, for he left him still able to walk away, and ran away himself.

HANNEN, J., to the jury.—Assuming that the prisoner caused the death of the deceased, it would be for the prisoner to show a justification. In the absence of such a justification the presumption of law would be that he intended to kill the deceased. But the law considers that in some cases there may be circumstances which, though they fall short of a justification, establish such a provocation as may, on account of the excitement it has occasioned, so far excuse the act as to reduce the offence to manslaughter. Among these circumstances is the provocation supposed to arise when the deceased has endeavoured, without lawful authority, to arrest the prisoner and to deprive him of his liberty. But it does not follow that, because there has been such provocation, therefore it will justify taking the life of the officer. Far from it. The prisoner is only excused to the extent that it is presumed he acted, not with malice, but from the excitement of the moment. In a similar case, (a) where the prisoner, with a weapon he had in his hand, had killed the officer, that great judge Baron Parke said it was manslaughter. In such cases it is only an indulgence which the law allows to a man, and which amounts only to an excuse to reduce the crime to manslaughter. If, therefore, in the present case, the prisoner inflicted the blow you have heard described, and which caused the death of deceased, he is guilty of manslaughter.

*Verdict—guilty of Manslaughter. Sentence—
fifteen years' penal servitude.*

(a) *R. v. Patience* (7 C. & P. 775). There, however, the prisoner, without, so far as appeared, any necessity, drew his knife and *stabbed* the officer without any intermediate struggle or attempt to get away. And see *Reg. v. Phelps* (2 Car. & M. 180), and see *Reg. v. Lockley* (4 F. & F. 153) where the same distinction is drawn; and see the old law, *Simpson's case* (4 Inst. 335).

HOME CIRCUIT.

Lewes, March 23, 1871.

(Before Lord Chief Justice COCKBURN.)

REG. v. TATE. (a)

Perjury—Materiality—Relevancy to the legal charge.

On an indictment for perjury committed on the hearing of a charge of assault by a husband on his wife, an assignment of perjury in a statement by the prisoner, as a witness for the husband, that he had seen the wife committing adultery (of which he had told the husband), held bad for immateriality, as the supposed statement would not be legally relevant to the charge of assault as affording no ground of legal justification.

PERJURY.—The prisoner was indicted for wilful perjury, committed on the hearing of a charge against one Smith for an assault upon his wife, and the assignment of perjury was on a statement by the prisoner—as a witness for the husband, Smith—that he had seen Smith's wife under such circumstances as to lead to the impression that she was committing adultery, which he had told Smith just before the assault.

Grantham for the prosecution.*Hall* for the prisoner.

On the case being opened,

Hall submitted for the prisoner that the assignment of perjury was bad, as being immaterial. It was not material to the charge of assault, as it did not affect the fact of an assault.

COCKBURN, C.J.—The statement that the prisoner had seen the wife of Smith committing adultery, though told to Smith, would not be legally material on the charge of assault. It could not affect the fact of the assault, nor the legal liability for it, for it could afford no legal justification. At the utmost it could only suggest a provocation, which might afford some mitigation of punishment; but it could not affect the legal character of the act of assault or the legal liability for it. The prisoner, therefore, could not be convicted upon this indictment, as the assignment of perjury was not legally material.

Verdict—not guilty.

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

HOME CIRCUIT.

Lewes, March 21, 1871.

(Before Lord Chief Justice COCKBURN.)

REG. v. ROXBURGH. (a)

Assaulting a police-constable—Resistance of removal from a house—Lawfulness of constable's use of force for the purpose—Practice—Felonious assault—Discharge of jury and conviction for a common assault, with a view to compensation.

Although a police-constable may not be bound, in the execution of his duty, to assist the occupier of a house in putting out an intruder, yet he may lawfully do so, and if he sustains violence in so doing, the party inflicting such violence, though he may not be indictable for assaulting a police constable in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him.

On an indictment for a felonious assault, the jury being unable to agree as to the felonious intent, were discharged by arrangement, in order that the prisoner might plead guilty to a common assault with a view to compensation.

THE PRISONER was indicted for feloniously assaulting one Chalmers, with intent to do him grievous bodily harm.

Willoughby for the prosecution.

Barrow for the defence.

It appeared that the prisoner had been drinking at a public-house, and was so much the worse for liquor that the publican desired to get him out, and called in Chalmers, a police-constable. The man had wanted to go to bed, and the publican had assented to this, but the man desired a light, with which, on account of his condition, the publican refused to entrust him. Thereupon the prisoner said he would leave, and then he said he would not, and upon this the publican desired the prosecutor to assist in ejecting him, which he attempted to do. In resisting him the prisoner inflicted a serious injury, for which he was now indicted. The defence was, that the violence used by the prosecutor was unlawful, as he had no right to use force to eject the prisoner, and was acting beyond his duty in doing so; and the

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

magistrates had so far acquiesced in this view that the prisoner had not been committed or indicted for assaulting the police-officer in the discharge of his duty, but only for inflicting grievous bodily harm.

COCKBURN, C.J., said that, although, no doubt, the prosecutor might not have been acting—strictly speaking—in the execution of his duty as a police-officer, since he was not actually obliged to assist in ejecting the prisoner, yet he was acting quite lawfully in doing so; for the landlord had a right to eject the prisoner under the circumstances, and the prosecutor might lawfully assist him in so doing.

The question was as to the felonious intention with which the injury was inflicted.

The jury not being able to agree after having been locked up some time,

Barrow, for the prisoner, applied to have them discharged, that he might be permitted to plead guilty to a common assault, on the understanding that the prisoner should make compensation to the prosecutor.

Willoughby, for the prosecutor, assented.

COCKBURN, C.J., said that, under the circumstances, he saw no objection to this course, and he discharged the jury accordingly.

The prisoner pleaded guilty to an assault, for which he was fined one shilling and discharged, having—in court—paid 250*l.* as compensation to the prosecutor.

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COURT OF CRIMINAL APPEAL.

*January 28, 1871.**(Before BOVILL, C.J., CHANNELL, B., WILLES, J., PIGOTT, B., and HANNEN, J.)**REG. v. COOKE. (a)**Larceny—False pretences—Master and servant.*

The prisoner, a foreman, by fraudulently misrepresenting that 21l. 18s. was due for wages to the men under him, obtained that sum from his master's cashier. On the pay-sheet made out by the prisoner 1l. 10s. 4d. was set down as due to W., whereas only 1l. 8s. was due, and that amount only was paid by prisoner to W. out of the 21l. 18s.; the excess, 2s. 4d., was appropriated, out of the 21l. 18s., to the prisoner's own use, he intending so to appropriate it at the time he received the 21l. 18s.:

Held, that the prisoner was guilty of larceny of the 2s. 4d.

CASE reserved for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

At the Worcestershire Quarter Sessions, held on the 2nd of January, 1871, the above-named prisoner, Edwin Cooke, was tried before me for stealing certain moneys belonging to his master, one George Hands.

The said George Hands was a currier at Kidderminster, and in the habit of employing several workmen in his said business.

The prisoner was, in and before the month of November last, and continued until the early part of the following month to be, a servant of the said George Hands, being employed at a weekly salary as a confidential foreman over the workmen.

It was part of the duty of the prisoner to engage and dismiss the workmen, as occasion required; and he generally, but not invariably, consulted his master as to such engagement and dismissal, and as to the amount of wages at which such workmen were to be engaged.

The workmen were engaged at so much a week for ordinary time, and they were to be paid after the same proportionate rate for any overtime.

A wages book was kept at the master's counting-house, and

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

was given out to the prisoner on the morning of every Saturday (which was the pay-day for the workmen), in order that he might enter on a pay-sheet in the said book the names of the several workmen who had been employed during the week, and to set opposite to each person's name the amount due to him for wages. When this was done, the prisoner, according to the usual practice, brought back the book to the counting-house, and gave it to the master's cashier, who generally showed it to the master. The several sums entered in the pay-sheet were then added up, and the total amount paid by the cashier to the prisoner, whose duty it would be to pay thereout to the several workmen their respective wages.

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Among the workmen so employed under the prisoner in the month of November last was a man named Williams, who had been engaged by the prisoner at 24s. a week for ordinary time (overtime, if any, to be paid for in addition at the same proportionate rate). During the week ending the 12th of November last, Williams had worked overtime, and the wages due to him for that week, calculated at the rate of 24s. a week, amounted to the sum of 1l. 8s., and no more. The prisoner, however, had before this time fraudulently represented to his master that Williams had been engaged at the rate of 26s. a week, and in the aforesaid pay-sheet for the week ending the 12th of November last he fraudulently set opposite the name of Williams, instead of the said sum of 1l. 8s. (the correct amount due to him), the sum of 1l. 10s. 4d., being, in fact, the amount that Williams would have been entitled to if he had been engaged at the rate of 26s. instead of 24s. a week.

The total amount of the wages in the said pay-sheet for that week, including the said sum of 1l. 10s. 4d., so represented to be due to Williams, was the sum of 21l. 18s., and the said cashier, in ignorance of the fraud practised by the prisoner, and believing that the said pay-sheet was correct, on the same 12th of November paid to the prisoner out of his master's moneys the said sum of 21l. 18s., in order that he might by means thereof pay the several workmen mentioned in the pay-sheet the wages due to them respectively, and the prisoner was not authorised, either by his master or by the cashier, to apply any part of such moneys for any other purpose.

After obtaining the said sum of 21l. 18s. from the cashier in manner aforesaid, and on the same day, the prisoner paid thereout to Williams the sum of 1l. 8s., being the correct amount of the wages due to him, and fraudulently appropriated thereout to his own use the sum of 2s. 4d., being the excess of the sum represented in the said pay-sheet to be due to Williams over the sum actually due, and the prisoner intended, at the time when he obtained the said money from the cashier, to appropriate the said excess to his own use, and to defraud his master of the same.

The appropriation of this excess of 2s. 4d. was the subject of the first count of the indictment, on which the prisoner was tried.

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There were two other counts charging the prisoner with stealing moneys belonging to his master, but the facts, except as to the names, dates, and amounts, being exactly the same as those proved under the first count, are not necessary to be stated for the purposes of this case.

It was objected by the counsel for the prisoner that, even if the above facts were proved, the offence of the prisoner was not a felony, but that of obtaining money by false pretences.

I declined to withdraw the case from the jury on that objection; but a verdict of guilty having been returned, I reserved the point for the consideration of this Court, and judgment was in the meantime postponed; and the prisoner, not having, as I believe, been able to obtain the required bail, is now detained in the Worcester prison.

The question on which I respectfully desire the opinion of the Court is, whether the prisoner, on the foregoing state of facts, was properly found guilty of felony.

(Signed) R. PAUL AMPHLETT,
Chairman of the above Court of Quarter Sessions.

F. T. Streeten (*Jelf* with him), for the prisoner.—The conviction for larceny was wrong, for the offence (if any) committed by the prisoner amounts only to obtaining money by false pretences. The cashier had authority from his master to pay the 2*l.* 18*s.* to the prisoner, and he did so, intending to part with the money absolutely to the prisoner. The property being parted with by the cashier, the offence was not larceny. In *White v. Garden* (10 C. B. 927), Talfourd, J., said: "There is a very obvious distinction between the cases of goods obtained by felony and fraud, or false pretences. In the one case the owner of the goods has no intention to part with the property; in the other he has." Lord Wensleydale expressed the same view in *Powell v. Hoyland* (6 Ex. 70). The same distinction between larceny and false pretences is laid down in 2 Russell on Crimes, 200 (4th edit.), Arch. Crim. Plead. 312 (16th edit.), and 2 East P. C. 816; and the distinction is a substantial and material one, and was upheld in *Reg. v. Prince* (11 Cox C. C. 193; 38 L. J. 8, M. C.). [*BOVILL, C.J.*—Assume that it was not larceny when he obtained the gross sum from the cashier; but when he had paid away all that he ought to have paid away, and there remained a balance in his hands, whose money was that? Was it not his master's, and if so, does not the case fall within the late Act as one of a fraudulent conversion of the balance to the prisoner's own use, which offence the Act defines to be larceny?] This was not a bailment of the money to the prisoner; there was no specific coin of which the prisoner was a bailee, and bound to restore. The test is, whether at the time the cashier parted with the money to the prisoner, he intended to part with the ownership in it, and it is submitted upon the facts stated that he did. The offence was complete at the time the prisoner obtained the money by the

false pretences. In *Reg. v. Thompson* (9 Cox C. C. 222; L. & C. 233), a merchant's clerk, having fraudulently represented to the cashier that a larger sum than 1l. 3s. was due for dock dues, and obtained it, and appropriated the difference to his own use, was held not to have been guilty of larceny. There Williams and Wightman, JJ., both pointed out the difficulty there was as to any particular coin having been stolen by the prisoner, as the money was paid over to the prisoner in a lump, and he was justly entitled to a part of what was so paid to him. And Pollock, C.B., said, "No doubt the prisoner obtained the money by false pretences, but it was not larceny." That case proceeded on the principle decided in *Reg. v. Leonard* (3 Cox C. C. 284; 1 Den. C. C. 304), where the prisoner was a foreman, and the money was obtained by cheque. The following cases were then cited to show that this was not a case of fraud by a bailee: *Reg. v. Prince* (*supra*); *Reg. v. Hassell* (8 Cox C. C. 491); *Reg. v. Thompson* (9 Cox C. C. 222). Here the money was parted with in the first instance, once for all, and to put it as money stolen after the correct amount for wages was paid is not consistent with the facts. [BOVILL, C.J., referred to *Reg. v. Goode* (Car. & M. 582), where the master gave the prisoner 3l. to pay canal dues, and he paid a part only, and appropriated the rest to his own use, and the prisoner was convicted of larceny.] That case is commented on in a note in *Reg. v. Thompson* (9 Cox C. C. 222), where, after reviewing all the cases, it is said: "The true distinction to be drawn from these cases appears to be, that if the master delivers money to the servant for a specified purpose, with the understanding that the identical coins delivered are to be applied to that purpose, and the servant converts them to his own use with a felonious intent, he is guilty of felony; but if the master delivers to the servant a gross sum of money, to make certain payments out of that sum, not intending that the identical coins delivered shall be applied to any particular payment, but leaves the servant at liberty to make any use he pleases of the specific coin delivered, provided he applies a similar amount of money to the purposes indicated, the master must be taken to have parted with the money, and the servant cannot be convicted of larceny if he convert the money to his own use, although, if he had obtained it by means of a false pretence, he may be convicted of the latter offence. This view of the law is consistent with that adopted in the case of larceny by bailees, with regard to whom it has been held that they cannot be convicted of larceny for converting to their own use money deposited with them in cases where they are only under an obligation to return the amount, and not the identical coin deposited." [WILLES, J.—That note is very good law with one qualification, that where, as was said by Lord Wensleydale, money is handed to a servant, the servant must *primâ facie* be taken to hold it as the master's, and for the purpose intended by the master. BOVILL, C.J., referred to *Reg. v. Watts* (6 Cox

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C. C. 304).] If this is larceny it is difficult to see when the offence was complete. *Reg. v. Barnes* (5 Cox C. C. 112 ; 2 Den. C. C. 59) was also cited.

J. O. Griffiths (*Montagu Williams* with him), for the prosecution, was stopped by the Court.

BOVILL, C.J.—The real point submitted to us in this case is whether there was any evidence to go to the jury of a larceny having been committed. The objection raised by the prisoner's counsel was that, even if the facts stated in the case were proved, the offence of the prisoner was not a felony, but that of obtaining money by false pretences. The point is substantially whether on the facts stated there was any evidence of a larceny that ought to have been submitted to the jury, or whether the case ought to have been withdrawn from them. The facts are that the cashier of the prosecutor, in ignorance of the fraud practised upon him by the prisoner, paid to the prisoner 21*l.* 18*s.* of the moneys of his master, in order that he might by means thereof pay the several workmen mentioned in the pay-sheet the wages due to them respectively, and the prisoner was not authorised either by his master or by the cashier to apply any part of such moneys for any other purpose. After obtaining the said sum of 21*l.* 18*s.*, and on the same day, the prisoner paid thereout to Williams the sum of 1*l.* 8*s.*, being the correct amount of the wages due to him, and fraudulently appropriated thereout to his own use the sum of 2*s.* 4*d.*, being the excess of the sum represented in the pay-sheet to be due to Williams over the sum actually due, and the prisoner intended at the time when he obtained the money from the cashier to appropriate the said excess to his own use and to defraud his master of the same. The whole foundation, therefore, of the argument of the prisoner's counsel fails, viz., that the jury could not find the identical money misappropriated, because the case states the receipt of the particular sum of the master's money, and that the prisoner paid *thereout* 1*l.* 8*s.* to Williams, and fraudulently appropriated *thereout* to his own use 2*s.* 4*d.*, being the excess of the sum represented in the pay-sheet. On that footing this case steers clear of the difficulty which has arisen in many of the cases, for upon this evidence there was a misappropriation of the very moneys he received from his master. It is now contended that the money was obtained by false pretences in the first instance, but that was a question for the jury. Independently of that, a second point was taken as to the condition of the money at the time of the misappropriation. Was it the property of the master? The money handed over to the prisoner through the hands of the cashier remained the property of the master, and though in the actual possession of a servant, was in the constructive possession of the master. Under these circumstances a servant stands in a different position to a bailee at common law. A bailee is possessed of certain rights over property entrusted to him, but a servant's possession is the constructive possession of his master, and at common law he

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is guilty of larceny if he fraudulently appropriates his master's property to his own use. In some cases, where a servant received money from third persons on account of his master, it was formerly said there was no constructive possession in the master, and the statutes relating to embezzlement were passed to meet those cases. *Reg. v. Watts* (6 Cox C. C. 304) was an instance of that. There, the prisoner being a servant and the money received being his masters', and constructively in their possession at the time the prisoner appropriated it, the prisoner was guilty of larceny. In this case the money remained in the possession of the prisoner, and then whose money was it? Why the masters'. At the time when the prisoner took possession of the 2s. 4d. and appropriated that money, whose money was it? I answer, the master's; and therefore it seems to me that the prisoner was guilty of larceny, and that there was abundant evidence in support of this. As to the case of *Reg. v. Thompson*, that proceeded altogether on the ground whether there was larceny in the first instance, but that does not touch the second point here. No point was made there as to the effect of the Bailee Act, or that the possession of the prisoner was that of a servant. The moment it is established that it is a misappropriation of money entrusted to a servant, the case falls within *Reg. v. Goode* and similar cases. The case of *Reg. v. Prince* was not a case of master and servant, and is therefore distinguishable. I therefore think the conviction was right.

WILLES, J.—I merely wish to refer, in confirmation of the Lord Chief Justice's judgment, to a passage very much in point in Russell on Crimes, p. 388, where the case of *Reg. v. Murray* is stated thus: "So, if money has been in the possession of the master by the hands of one of his clerks, and another of his clerks receives it from such clerk and embezzles it, it is larceny. The prisoner was a clerk in the employ of A., and received 3l. of A.'s money from another clerk, that he might pay for inserting an advertisement. He paid 10s., and charged A. 20s., fraudulently keeping back the difference. And upon a case reserved it was held that this was not embezzlement, because H. had had possession of the money by the hands of the other clerk, and Mr. Greaves, in a note, adds, "*ergo*, it was larceny."

The other Judges concurred.

Conviction affirmed.

Attorney for the prosecution, *Miller Corbett*, Kidderminster.

Attorney for the defence, *H. Saunders, jun.*, Kidderminster.

COURT OF CRIMINAL APPEAL.

*January 28, 1871.**(Before BOVILL, C.J., CHANNELL, B., WILLES, J., PIGOTT, B., and HANNEN, J.)**REG. v. RUGG.(a)**Neglect to provide child with proper food—Ability of parent to provide—Evidence—Indictment.**An indictment alleged in the first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child, she being able and having the means to do so. The second count charged that the prisoner unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so.**The jury returned a verdict of guilty, on the ground that if the prisoner had applied to the guardians for relief she would have had it :**Held, that neither count was proved, as it was not enough that the prisoner could have obtained the food on application to the guardians.**Quære, whether the second count is good in law.***C**ASE reserved for the opinion of this Court by the Recorder of the Borough of Plymouth.

At the General Quarter Sessions of the Peace for the Borough of Plymouth, held on Friday, the 30th of December, 1870, a bill of indictment was preferred against Florence Rugg in the following form :

Borough of Plymouth.	}	The jurors for our Lady the Queen upon their oath present, that Florence Rugg, single woman, of the Borough of Plymouth aforesaid, on the 20th of November, 1870, was the mother of one Mary Jane Rugg, an infant of tender years, to wit, of the age of five years ; and that the said Mary Jane Rugg was then and there under the care, dominion, and control of the said Florence Rugg, and wholly unable to provide for herself ; and that on the day and year afore-
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(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

said, and on divers other days and times, as well before as after that day, it was the duty of the said Florence Rugg to protect, shelter, and nourish the said Mary Jane Rugg, she, the said Florence Rugg, being able and having the means to perform and fulfil her said duty; and the jurors aforesaid, upon their oath aforesaid, further present that the said Florence Rugg, well knowing the premises and not regarding her duty in that behalf, on the said 20th of November, 1870, and on divers other days and times, as well before as after that day, in the borough aforesaid, did unlawfully and wilfully neglect and refuse to find the said Mary Jane Rugg with sufficient meat, drink, wearing apparel, bedding, and other necessities proper and requisite for the sustenance, support, clothing, covering, and resting the body of the said Mary Jane Rugg, by means whereof the said Mary Jane Rugg became weak, sick, and ill, and greatly emaciated in her body, against the peace of our said Lady the Queen, her crown and dignity.

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provide a child
with food*

Second count.—And the jurors aforesaid upon their oath present, that the said Florence Rugg on the 20th of November, 1870, and on divers other days and times, as well before as after that day, in the borough aforesaid, being the mother of one Mary Jane Rugg, an infant of tender years, to wit, of the age of five years, under the care, dominion, and control of the said Florence Rugg, and wholly unable to provide for herself, unlawfully and wilfully did neglect and refuse to find and provide for the said Mary Jane Rugg sufficient meat, drink, wearing apparel, bedding, and other necessities proper and requisite for the sustenance, support, clothing, covering and resting the body of the said Mary Jane Rugg, by means whereof the said Mary Jane Rugg became weak, sick, and ill, and greatly emaciated in her body, against the peace of our said Lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Florence Rugg, on the 20th of November, 1870, in and upon one Mary Jane Rugg, did make an assault, and her the said Mary Jane Rugg did then beat, wound, and illtreat, and other wrongs to the said Mary Jane Rugg then did, to the great damage of the said Mary Jane Rugg, against the peace of our said Lady the Queen, her crown and dignity.

The grand jury, on delivering the bill to the clerk of the peace, declared that they returned a true bill, but their indorsement on the bill was in the following words:

“We find a true bill against Florence Rugg, for not providing food for her child. “JOHN PLIMSAUL, Foreman.”

Inadvertently the special indorsement had not been called to the attention of the court till after the grand jury had been discharged and had dispersed and left the court.

The defendant was arraigned on the whole indictment and

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pleaded not guilty, and was tried and found guilty on the first two counts, but the jury added, in giving their verdict, "We do so on the ground that if she had applied" (to the guardians) "for relief she would have had it."

There was no evidence of an assault.

Clarke prosecuted for the Guardians of the Poor.

The prisoner was undefended.

Judgment was postponed, and the following questions reserved for the consideration and decision of this court, viz.:—First, whether the presentment of the grand jury was sufficient? (*R. v. Cooke*, 8 C. & P. 582.) Secondly, if it were, whether, upon the verdict given on the ground alleged by the jury, the Recorder ought not to have directed an acquittal? (*Reg. v. Chandler*, 6 Cox C. C. 519.)

No counsel appeared on either side.

BOVILL, C.J.—In this case the prisoner was indicted for not providing food for her infant child. In the first count it is alleged that the prisoner unlawfully and wilfully neglected and refused to find the infant with sufficient food, &c., she, the prisoner, being able, and having the means to perform and fulfil her said duty, to protect, shelter, and nourish the infant. The second count stated that the prisoner unlawfully and wilfully neglected and refused to provide for her infant sufficient meat, &c., but did not contain any allegation of ability on the part of the prisoner to provide sufficient meat, &c. The grand jury returned a true bill against the prisoner "for not providing food for her child." Assuming that they intended to negative the charge of assault in the third count, the grand jury may be taken to have found a true bill on the first two counts. We have to consider the effect of the verdict of the petit jury on the first two counts. They found a verdict of guilty, but added, "we do so on the ground that if she had applied" (to the guardians) "for relief, she would have had it." The case of *Reg. v. Chandler* shows that that finding was not sufficient to maintain the first count of the indictment, which contains the allegation of ability and means on the part of the prisoner. On the second count of the indictment, assuming that count to be good, which we doubt, the allegation is, that the prisoner unlawfully and wilfully did neglect and refuse to find and provide her child with necessary food, &c., but there is no allegation that the prisoner had the means of procuring, or could have procured it, and wilfully abstained from doing so. The allegation in that count is not found by the jury. On these grounds we are of opinion that the conviction should be quashed.

The rest of the COURT concurring,

Conviction quashed.

NORFOLK CIRCUIT.

NORWICH WINTER ASSIZES, 1870.

(Before Mr. Justice LUSH.)

REG. v. HARRISON.(a)

*Larceny by an avowterer—What constitutes—Direction to the jury.**The prisoner eloped with the prosecutor's wife, travelling in a cart which the wife took from her husband's yard. The prisoner sold the pony, cart, and harness in the presence of the wife, who did not object to the sale and received the proceeds, which she retained after paying the prisoner a sovereign he had expended in obtaining lodging while they were living in a state of adultery :**Held, that the presence of the woman did not alter the offence ; that the fact that he negotiated the sale and received part of the proceeds was sufficient ; from the circumstances the prisoner must have known that the pony, cart, and harness were not the property of the woman ; and that if the jury were of opinion he had that knowledge, they were bound to convict him.*

JAMES HARRISON was indicted for stealing one pony, cart, and harness on the 7th of November, 1870, the property of Charles Patrick.

Cooper for the prosecution.

Reeve for the prisoner.

Sarah Patrick, the wife of the prosecutor, deposed that, on the 7th of November, 1870, she left her husband's home, taking the pony, cart, and harness to drive and see her son, who was at a boarding-school at Lynn. She knew the prisoner and had arranged to meet him at Clench Walton ; overtook him on the road, and subsequently went to Swaffham, where she spent the night in his company ; went with him to East Dereham and afterwards to Norwich, where the prisoner sold the pony, cart and harness without her consent or knowledge ; she took the money and put it in her purse.

By *Reeve* : I knew the prisoner had pawned his watch for 1l., and that we owed money for lodgings. When the pony and cart were sold I gave the prisoner 1l. out of the price to get his watch out of pawn, and that was all he had of the proceeds.

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

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Adulterer.

Samuel Greengrass, ostler, proved that the prisoner offered the pony and cart for sale for 10*l.* in the presence of the prosecutor's wife.

John Bere proved that he purchased the pony, cart, and harness of the prisoner for 8*l.* 8*s.* The prosecutor's wife was not present, but he paid the money to her and she did not object to the sale.

Reeve submitted that there was no case ; the prisoner was only acting as the agent of the woman, and received no part of the proceeds, except a sovereign which he had expended.

LUSH, J., summing up the case to the jury, said: If you are satisfied that the prisoner knew, at the time he disposed of these articles, that they were the property of the woman's husband, then you must find him guilty. So long as a wife is living properly with her husband, if she gives away his property, or sells it under ordinary circumstances, it would not be larceny ; but if a wife goes away with a man for the purpose of committing adultery, and takes with her her husband's property, and the adulterer either sells it or uses it as his own, he will be guilty of larceny. In this case it was not clear that the prisoner knew at the time of the elopement that the wife had taken, or was about to take, her husband's cart ; and if it had not been subsequently sold, there might have been a difficulty in the case. But was there any doubt that when the cart was sold the prisoner knew he was dealing with the husband's property. It had been said that the prisoner did not receive the proceeds ; that the woman was obliged to sell it to provide herself with necessaries. But she had no authority then to deal with her husband's property, as she had not been turned away from home by him ; the contention that the prisoner was merely acting as the agent of the woman would not be sufficient, as it appeared that in her absence he negotiated the sale and received part of the proceeds for defraying the expenses that he and the woman had incurred while living in a state of adultery.

Guilty. Sentence—Four months' hard labour.

NORTHERN CIRCUIT.

Manchester, December 8, 1870.

(Before Mr. Justice BRETT.)

REG. v. PEACOCK.(a)

Lunatic—Power of judge of assize to issue a writ of habeas corpus—Depositions of deceased—“Full opportunity” by prisoner of examining deceased—Presumption of law as to what is full opportunity within 11 & 12 Vict. c. 42, s. 17.

Where a prisoner was committed for trial by the magistrates to the assizes, but, after committal, was removed by them to the County Lunatic Asylum, the judge of assize has power to issue a habeas corpus to bring the prisoner up for his trial.

Where it is proved that the prisoner was present when the depositions of the deceased were taken, although the law will presume that, as he was present, he had a “full opportunity” within 11 & 12 Vict. c. 42, s. 17, evidence may nevertheless be offered to prove that he had not a “full opportunity” within sect. 17, so as to render the depositions inadmissible.

JOHAN PEACOCK was charged at Manchester on the 11th of September, 1870, with the manslaughter of John Plant. The alleged manslaughter took place under the following circumstances: The deceased and prisoner were lodging in the same house; the former came home on the night in question drunk, and attempted to enter the room in which prisoner was sleeping. The prisoner, thinking that he was going to be attacked, as he had a large sum of money about him, fired at deceased with a revolver, from the effects of which he ultimately died. The prisoner was brought before the magistrates and committed to take his trial for manslaughter at the next assizes, but as medical evidence was then given to the effect that he was labouring under insane delusions, he was removed by a warrant from the Secretary of State, under 27 & 28 Vict. c. 29, to Prestwich Lunatic Asylum, where he now was.

Leofric Temple now applied, on behalf of the prosecution, to Brett, J., for a *habeas corpus* to bring up the prisoner from Prestwich Lunatic Asylum.

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

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prisoner.

BRETT, J., said that proper affidavits must be first produced.

This was done ; and

BRETT, J., then made the order.

The prisoner was then put on his trial.

The jury were first sworn to try the question whether he was in a fit state of mind to plead.

Dr. Holland, of Prestwich Lunatic Asylum, deposed that the prisoner, although labouring under insane delusions, had sufficient memory to recollect that he had killed the deceased, and that he understood the plea of guilty or not guilty. The jury, therefore, found he was in a fit state of mind to plead, and he was therefore put on his trial for manslaughter.

Evidence was then given by a police-constable that the depositions of deceased were taken before a magistrate in presence of prisoner. Before, however, they were put in to be read,

Torr then proposed to ask this witness in what state of mind prisoner was at the time these depositions were being taken.

BRETT, J., doubted whether he could put the question, as the question whether he was insane at the time he committed the offence would be a question for the jury afterward.

Torr said that he put the question in order to see whether he had "*a full opportunity*," as enacted by 11 & 12 Vict. c. 42, s. 17, of examining deceased, because he contended that if he was insane at the time he had not a "*full opportunity*" within the meaning of the Act ; it must be a mental opportunity ; for instance, if prisoner was in a comatose state, it could not be said that he had such a full opportunity as was intended by the Act ; and, therefore, if he was insane at the time, he had not "*a full opportunity*," although he was in the presence of deceased.

BRETT, J., said it was a point of some difficulty, and he would consult Mellor, J., about it.

BRETT, J., after having consulted Mellor, J., said : I think you have a right to examine as to that point ; the presumption of law is that he had opportunity, but you may prove the contrary if you can, and call witnesses to prove that, at the time, he was not in a sane state of mind.

The jury eventually found that the prisoner was insane, and not in a fit state to take his trial.

COURT OF CRIMINAL APPEAL.

January 31, 1871.

(Before BOVILL, C.J., CHANNELL, B., WILLES, J., BYLES, J.,
and PIGOTT, B.)

REG. v. ARDLEY. (a)

False pretences—What amount to—False statement of fact.

The prisoner induced the prosecutor to buy a chain by knowingly and falsely asserting (inter alia) "it is 15-carat fine gold, and you will see it stamped on every link." In point of fact, it was little more than 6-carat gold:

Held, that the above assertion was sufficient evidence of the false representation of a definite matter of fact to support a conviction for false pretences.

CASE reserved for the opinion of this Court by the Chairman of the Court of Quarter Sessions for the county Palatine of Durham.

John Ardley was tried before me at the Winter Sessions held for the county of Durham on the 2nd of January, 1871, for obtaining 5*l.* and an Albert chain of the value of 7*s.* 6*d.* by false pretences. The first count of the indictment was in these words:

The jurors for our Lady the Queen upon their oath present, that John Ardley, on the 31st day of October, A.D. 1870, unlawfully, knowingly, and designedly did falsely pretend to one Thomas Wakefield that a certain Albert chain which he the said John Ardley then asked the said Thomas Wakefield to buy from him the said John Ardley, was of 15-carat gold, and that he the said John Ardley was then a draper, and that the said chain had been made expressly for him the said John Ardley; by means of which said false pretences the said John Ardley did then unlawfully obtain from the said Thomas Wakefield a certain sum of money, to wit, 5*l.*, and a certain other Albert chain of the value of 7*s.* 6*d.*, with intent to defraud, whereas in truth and in fact the said Albert chain which he the said John Ardley then asked the said Thomas Wakefield to buy from him the said John Ardley as aforesaid was not of 15-carat gold. And whereas in truth and in

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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fact he the said John Ardley was not then a draper ; and whereas in truth and in fact the said chain had not been made expressly for him the said John Ardley, as he the said John Ardley well knew at the time when he did so falsely pretend as aforesaid, against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her crown and dignity.

The material facts were as follows :—

The prisoner went into the shop of the prosecutor, who was a watchmaker and jeweller, and stated that he was a draper, and was 5*l.* short of the money required to make up a bill, and asked the prosecutor to buy an Albert chain, which he (the prisoner) was then wearing. The prisoner said, "It is 15-carat fine gold, and you will see it stamped on every link, It was made for me, and I paid nine guineas for it. The maker told me it was worth 5*l.* to sell as old gold."

The prosecutor bought the chain, relying, as he said, on prisoner's statement, but also examining the chain, and paid 5*l.* for it, and gave also to the prisoner, in part payment, a gold Albert chain, valued at 7*s.* 6*d.*

The prisoner's chain was marked "15-carat" on every link. And in a very short time afterwards he (the prisoner) was apprehended, and then wore another Albert chain, of a character similar to that sold to the prosecutor, this also being marked "15-carat" on every link.

It was proved that "15-carat" was a Hall mark used in certain towns of England, and placed on certain articles made of gold of that quality, and that chains, when assayed, are generally found to be one grain less than the mark, exceptionally two grains.

The chain bought by the prosecutor was assayed, and found to be of a quality a trifle better than 6-carat gold, and of the value in gold of 2*l.* 2*s.* 9*d.* It was proved that had it been 15-carat gold it would have been worth 5*l.* 10*s.* Adding the charge for what is called "fashion" or "make," and the price of a locket attached, the chain bought by the prosecutor would be sold for 3*l.* 0*s.* 3*d.*, but had it been 15-carat it would have been sold for 9*l.*

There were no drapery goods or anything connected with such trade found on the prisoner, but when arrested he had in his possession a licence to sell plate, two watches, two white metal watchguards, and the chain obtained from the prosecutor.

I was asked by counsel for the prisoner to stop the case on the authority of *Reg. v. Bryant* (7 Cox C. C. 313). This I declined to do, and left the case to the jury, who found the prisoner guilty, and, in answer to me, said they found that the prisoner knew he was falsely representing the quality of the chain as 15-carat gold.

The question for the opinion of this Honourable Court is whether or not the prisoner was rightly convicted of obtaining money under false pretences.

January 21, 1871.

JOHN R. DAVISON.

No counsel was instructed for the prisoner.

Edge, for the prosecution.—The conviction was right. The case is within the principle of *Reg. v. Dundas* (6 Cox C. C. 380), where the prisoner was convicted of falsely pretending that blacking labelled “Everett’s Premier” sold by him to the prosecutor was “Everett’s Premier” blacking. Erle, J., there told the jury, “that it was of little consequence whether the prisoner’s name was Everitt, as he had stated, or not, for even if it were, and he went about the country and offered blacking for sale as ‘Everett’s Premier,’ representing it to be the well-known article of that name, knowing that it was not so, and intending to cheat the prosecutor by passing upon him a spurious article as the true one, his conduct was equally fraudulent.” So here 15-carat gold was marked on each link, and the prisoner pretended not merely to sell a gold chain, but one of 15-carat gold. In *Reg. v. Goss* and *Reg. v. Ragg* (8 Cox C. C. 262) it was held that a false representation of an alleged matter of definite fact knowingly made, whether in the course of a bargain or not, is a false pretence within the statute. In *Reg. v. Ragg* the prisoner obtained money by falsely representing that he had delivered 15cwt. of coal when he knew that he had only delivered 8cwt. That is very like this case, for the representation was that the chain was 15-carat gold, when it was only a little more than 6-carat gold. *Reg. v. Bryant* was decided on the ground that the false statement was not of a definite triable fact, but matter of opinion, and the judges said that if the prisoner in that case had represented the spoons as Elkington’s A., it would have been a different thing, but his statement was only that they were equal to Elkington’s A. In *Reg. v. Jessup* (7 Cox C. C. 399; D. & B. 443) a person who fraudulently offered a one-pound note as a note for 5*l.*, and got it changed upon that representation, was convicted for obtaining money by false pretences, although the person to whom it was passed could read, and the note upon the face of it afforded the means of detecting the fraud. The following authorities were also cited: *Reg. v. Roebuck* (7 Cox C. C. 126; Dears. & B. 24); *Reg. v. Stevens* (1 Cox C. C. 83); and *Reg. v. Woolley* (4 Cox C. C. 191); 2 Russ. on Crimes, 665, note.

Greenhow (*amicus curiæ*), having been counsel for the prisoner at the trial, referred to *Reg. v. Ridgway* (3 F. & F. 29).

BOVILL, C.J.—At the conclusion of the evidence for the prosecution the learned Chairman was asked to stop the case, on the authority of *Reg. v. Bryant*. The question for the court at that stage was, whether there was any evidence in support of the charge to go to the jury? The court declined to stop the case, on the ground that there was. The evidence was left to the jury, and the prisoner was found guilty. It seems to me that it was quite impossible to stop the case on the evidence as it stood, because there was a distinct statement of a fact, and evidence that it was false. The prisoner also not only made a representa-

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tion with respect to the quality, but he made the statement in order to induce the prosecutor to purchase the chain. He went into the prosecutor's shop and stated that he was a draper, and was 5*l.* short of the money required to make up a bill, and asked the prosecutor to buy a chain. He said it was "15-carat fine gold, and you will see it stamped on every link;" that it was made for him, and that he paid nine guineas for it, and that the maker had told him it was worth five guineas to sell as old gold. All these are statements in addition to that with respect to the quality. And there was clear evidence to negative them, and they were made for the purpose of inducing the prosecutor to purchase the chain, and so of defrauding him. The case seems to come distinctly within the statute if the jury are satisfied that the statements are false and fraudulent. But the case does not depend on that alone, for there was evidence that the prisoner was not a draper, and there were found in his possession a licence to sell plate and certain articles of jewellery, and he was wearing another Albert chain similar to that sold to the prosecutor, and marked "15-ct." on every link. There was, therefore, evidence to negative the whole statement he made as to matters of fact; and the jury expressly found that the prisoner knew he was falsely representing the quality of the chain as 15-carat gold. The authorities draw nice distinctions between what is a statement of fact, and what is matter of opinion or exaggerated praise. It is difficult in many cases for the Court to come to the conclusion as to what is a matter of opinion and exaggerated praise, or what is a matter of fact; but the judge must direct the jury as to those matters, and tell them not to convict for mere matter of opinion and exaggerated praise, and that the false statements of matters of fact must be made with the intention to defraud. In the case of *Reg. v. Bryant* the prisoner represented that certain spoons were equal to Elkington's A.; not that they were Elkington's A., but equal to Elkington's A. *Primâ facie* that seems the expression of a matter of opinion and not one of fact, but at all events it was open to that construction. Though it was there decided that the conviction could not be supported, yet many of the judges expressed the opinion that it might be the subject of false pretences, although a false statement was made with reference to the quality of the article, if the statement was false to the knowledge of the party and made with the intention to defraud. Cockburn, C.J., said in the course of his judgment: "If the person had represented these articles as being of Elkington's manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing; but the representation here made was only a vaunting and exaggerating of the value of the article in which he was dealing by representing it to be in quality equal to a particular manufacture." Pollock, C.B., said: "I think if a tradesman or a merchant were to concoct an article of merchandise expressly for the purpose of deceit and were to sell it as and for something very different, even in quality,

from what it was, the statute would apply." So that a statement as to the character of an article, but which is in fact a misrepresentation of the quality, is not sufficient; but a misrepresentation as to the quality is sufficient, if it is known that it is not the quality which it is pretended to be. Coleridge, J., said, "I agree with the Lord Chief Baron in the latter part of his observations, as it seems to me it would be a dangerous thing to say that there could be no fraudulent misrepresentation within the statute in the course of an ordinary transaction of buying and selling. . . . It seems to me to be a safe rule to say, where it applies simply to the quality, and is only in the nature of an exaggeration on the one hand or a depreciation on the other, which too frequently takes place even in tolerably honest transactions between parties, this is not the subject of a criminal proceeding." Erle, J. treated the representation as a misrepresentation on a matter of opinion rather than of a definite matter of fact, and on that ground decided against the conviction. He said, "No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction on the ground that there is no affirmation of a definite triable fact in saying the goods were equal to Elkington's A., but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendee has in substance the article contracted for, namely, plated spoons." His Lordship then referred to the judgment of Crompton, J. The opinion of my brother Willes, carefully and elaborately given in that case, goes to the effect that a misrepresentation of quality made with intent to defraud is within the statute, Bramwell, B., also was in favour of a conviction in that case. Applying those observations to the case before us, how does it stand? The statement made by the prisoner was not one of mere opinion or exaggerated praise, or an opinion as to its probable quality, but it was a distinct statement that the chain was 15-carat fine gold, untrue to the knowledge of the prisoner, and of which there was abundant evidence. How different it is to the case where a man manufactures a chain, knows it is of a different standard of gold, and yet goes and misrepresents the standard. This case is distinguishable from *Reg. v. Bryant*, for here there was a distinct statement of a matter of fact false to the knowledge of the prisoner and made by him with intent to defraud. The conviction therefore was correct, and must be affirmed.

WILLES, J.—I am of the same opinion. The majority of the judges in *Reg. v. Bryant* held that if the statement of the prisoner had been that the electro-plate was Elkington's A. it would have been sufficient within the statute.

BYLES, J.—I am of the same opinion. We are not infringing on the authority of *Reg. v. Bryant*, which was decided on the principle that *simplex commendatio* is not criminal, but here the

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statement was that the chain was one of 15-carat fine gold, which was not true.

CHANNELL, B.—I am of the same opinion. I decide that the conviction is good on the ground that the learned chairman was not bound to stop the case, and that there was evidence for the jury in support of the prosecution.

PIGOTT, B.—I am of the same opinion. It was not intended to bring within the criminal law any mere statement of matter of opinion, however strongly expressed; but in this case I think there was a false statement of a fact knowingly made for the purpose of defrauding the prosecutor.

Conviction affirmed.

Attorneys, *Shum and Crossman.*

NORTHERN CIRCUIT.

Manchester, March 13, 1871.

(Before Mr. Justice WILLES.)

REG. v. MYCOCK.(a)

Abduction—Unmarried girl under sixteen—Custody or possession of father—24 & 25 Vict. c. 100, s. 55.

To support an indictment for the abduction of an unmarried girl under sixteen years of age it is not necessary to prove that the person who abducted her knew her to be under sixteen, as the person who does so is bound to ascertain her age, and if she turns out to be under sixteen, he must take the consequences. A girl who is away from her home is still in the custody or possession of her father, if she intends to return. Reg. v. Olifer (10 Cox C. C. 402) followed.

THOMAS MYCOCK was indicted, under 24 & 25 Vict. c. 100, s. 55, with having, on the 8th of February, 1871, unlawfully taken Christina Masper, being an unmarried girl under the age of sixteen years, out of the possession and against the will of her father.

Richardson appeared for the prosecution.

Torr appeared for the defence.

Christina Masper, who looked considerably more than sixteen

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

years of age, gave the following evidence: My father keeps a shop in Churchgate-street, Bolton, and is an optician. I live with him, and did so on the 8th of February last. I first made the prisoner's acquaintance in April, 1870. He was then a barman at a tavern opposite my father's shop. After this time we often used to meet and go walks together. On the 8th of February last we met by appointment in Bratchergate, in Bolton, and we walked towards the Lancashire and Yorkshire Railway station. He did not suggest to me about running away with him. After we had passed the iron foundry, a little beyond the railway station, he asked me to turn back and go into the railway station with him. I at first said I would not, as people would think I was running away with him. I afterwards consented, and he got tickets, and we went to Manchester by the next train. When I arrived in Manchester he gave me a ring to wear, as he said, for the sake of appearances. We then went to some lodgings, and spent the night together. The next day we spent in sight-seeing, and that night we went back to some lodgings, and stayed there. On the following day I came back home to my father's at Bolton. When I went with him to Manchester I thought he was going to marry me at Manchester, but he did not, however, do so.

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Cross-examined: I asked him to meet me on the 8th of February. I went out of the house that day without my father's permission. I never told the prisoner my age. My father would let me marry him now if he (the prisoner) would settle anything on me. He said, at Manchester, that he wanted to marry me then, but he said I was too young, and he should not like to do so without my friends' consent.

Augustus Masper then gave the following evidence: The last witness is my daughter. She will be sixteen years of age on the 29th of July next. I never gave my sanction to her going away with the prisoner on February 8th. I knew of her intimacy with the prisoner, and my wife and I both objected to it.

Torr contended there was no case proved. Under the Act it must be shown that he took her from her father's house; in this case she asked the prisoner to meet her, and he, in consequence, did so. It could not be said that he took her out of the possession of her father when she left her father's house without any persuasion on his part; here he met her some distance from her father's house, and then, when she was out of the possession of her father, he then went away with her—see *Reg. v. Olifier* (10 Cox C. C. 402), where Baron Bramwell said that, if a woman got fairly away from her home without any persuasion on the part of the man, and she went to him, he could not be said to be infringing the Act of Parliament.

WILLES, J.—The girl is in the constructive possession of her father so long as she has the intention of returning to her father.

Torr.—Secondly, the prisoner never knew that the girl was under sixteen. The *scienter* by the prisoner of her age ought

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certainly to be proved, *e.g.*, in this particular case the girl looks nearly eighteen or nineteen; and the girl herself admits that, as far as she knew, the prisoner did not know her age. This case, therefore, is a strong instance where injustice would be done if it is not necessary for the prosecution to prove that the prisoner knew the girl to be under sixteen. Now, it has been decided that a knowledge by the prisoner of the fact that the girl was in the custody or possession of her father, and at the father's house at the time he took her away, is essential in order to prove the offence; therefore, with equal reasoning, the knowledge of her age ought to be considered essential in proving the offence.

WILLES, J.—I think that the case of *Reg. v. Robins* (1 Car. & Kir. 456) proves that *scienter* by the prisoner of the girl's age is not necessary.

WILLES, J., in summing up, said that the fact of the girl being a consenting party could not, so far as the jury were concerned, absolve the prisoner from the charge of abduction, although it might be a matter for some consideration in dealing with him afterwards, should the case result in a conviction. The statute upon which the prosecution was based was for the protection of the rights of parents, and the prisoner had no more right to deprive the father of the girl of his property, as it were, in her, and his possession of her, than he would have a right to go into his shop and carry away one of his telescopes or optical instruments. The girl was, also, just as much in the possession of her father when she was walking in the street, unless she had given up the intention of returning home, as if she had actually been in her father's house when taken off. Lastly, the prisoner was bound to ascertain the girl's age; or, failing that, to take the consequences of abducting her, if it turned out that she was under sixteen.

Guilty. Three months' imprisonment.

NORFOLK CIRCUIT.

BEDFORD SPRING ASSIZES, 1871.

March 15.

(Before Mr. Justice BLACKBURN.)

REG. v. BULL.(a)

Murder—Illness of witness—11 & 12 Vict. c. 42, s. 17.

Upon the trial of the prisoner it was proposed to put in evidence the deposition of a witness absent through illness. The evidence that he was unable to travel was that of a medical man who last saw the witness on the Monday previous to the trial, which took place on Wednesday :

Held, that this was not sufficient, and the deposition was rejected.

WILLIAM BULL was indicted for the wilful murder of Sarah Marshall at Little Staughton on the 29th of November, 1870.

Metcalf and *Byles* for the prosecution.

Jacques for the prisoner.

Metcalf proposed to put in the deposition of Frederick Darlow, who had been duly examined before the committing magistrates, but who was absent in consequence of illness, and was unable to travel.

Mr. Hemming, surgeon, Kimbolton, was called to prove the inability on the part of the witness Darlow to travel. He said : I know Frederick Darlow. I saw him on the afternoon of Monday, the 13th ; he was not then in a fit state to travel.

By His LORDSHIP.—He was attacked on the Friday. He was recovering from a severe attack of pain in the bowels, and was too feverish to travel on Monday afternoon. I advised him not to come to the trial. I have not seen him since. It is possible he might have sufficiently recovered in forty-eight hours to have travelled, but I should not have advised it.

BLACKBURN, J., after reviewing the evidence given above, said : I doubt much whether this is sufficient. No one has seen the witness for forty-eight hours, and he might become sufficiently recovered in that period. I do not think I can receive the deposition.

Guilty. Sentence—Death.

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

NORTHERN CIRCUIT.

Liverpool, March 23, 1871.

(Before MARTIN, B.)

REG. v. CHERRY.(a)

Fraudulent debtor—32 & 33 Vict. c. 62 (Bankruptcy Act, 1869), pt. 2, s. 13, sub-sects. 13 and 14—False representation—Intention to defraud—Ordinary way of trade—Admissibility of bankruptcy proceedings not affected by promise made to defendant at the time of making them.

To make the false representation fraudulent it must be made knowingly by the defendant :

Where the defendant pretends to be dealing in the ordinary way of business, but is not in reality doing so, the onus is on him to satisfy the jury that he was acting honestly, and had no intention to defraud.

An examination of the defendant before the Registrar of the Bankruptcy Court is admissible in criminal proceedings taken against him, although a promise was made to him, before his examination, that it would not be used against him, or filed.

THE defendant, Pim Cherry, was charged with several offences under the Bankruptcy Act, 1869. There were four counts in the indictment. The first and second counts were under sub-sect. 13, charging the defendant with having at Liverpool, in July, 1870, fraudulently obtained goods, to wit, twenty-five bales of cotton, on credit within four months before a petition in bankruptcy was presented against him ; the third and fourth counts were laid under sub-sect. 14, charging him that he, being a trader at Liverpool in July, 1870, by the false pretence of carrying on business and dealing in the ordinary way of his trade, obtained property, to wit, twenty-five bales of cotton, on credit within four months before a petition in bankruptcy was presented against him.

The indictment was as follows :

Lancashire, } The jurors for our Lady the Queen upon their
to wit. } oath present, that heretofore and before the
committing hereinafter mentioned, to wit, on the 16th day of

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

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August, A.D. 1870, a bankruptcy petition was presented against Pim Cherry, and the said Pim Cherry was thereupon, to wit, on the 26th day of August, A.D. 1870, adjudged a bankrupt; and that the said Pim Cherry, within four months next before the presentation of the said bankruptcy petition against him, to wit, on the 26th day of July, A.D. 1870, by the false representation to one Michael Belcher that he, the said Pim Cherry, was then buying the property hereinafter mentioned in part fulfilment of an order for sixty bales, and that he had funds in hand to pay for it, or an equivalent to funds, did obtain from the said Michael Belcher property, to wit, twenty-five bales of cotton, and has not paid for the same, whereas in truth and in fact the said Pim Cherry was not then buying the said property in part fulfilment of an order for sixty bales, and had not funds in hand to pay for it, and had not an equivalent to funds, as he, the said Pim Cherry, well knew when he made such false representations as aforesaid against the form of the said statute in such case made and provided.

Second count.—And the jurors aforesaid, on their oath aforesaid, do further present, that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the 16th day of August, A.D. 1870, a bankruptcy petition was presented against the said Pim Cherry; and the said Pim Cherry was thereupon, to wit, on the 26th day of August, A.D. 1870, adjudged bankrupt; and that the said Pim Cherry within four months, and before the presentation of the said petition against him, to wit, on the 26th day of July, A.D. 1870, by the false representation to the said Michael Belcher that he, the said Pim Cherry, who was then carrying on business as a cotton broker, was then buying the property hereinafter mentioned as a broker, acting on behalf of a principal, did obtain from the said Michael Belcher property, to wit, twenty-five bales of cotton, on credit, and has not paid for the same; whereas in truth and in fact the said Pim Cherry was not then buying the said property as broker acting on behalf of a principal, as he, the said Pim Cherry, well knew at the time when he made such false representation as aforesaid, against the statute in such case made and provided.

Third count.—And the jurors aforesaid, on their oath aforesaid, do further present, that heretofore and before the committing of the offence hereinafter mentioned, to wit, on the 16th day of August, A.D. 1870, a bankruptcy petition was presented against the said Pim Cherry, and the said Pim Cherry within four months next before the presentation of the said bankruptcy petition against him, to wit, on the 26th day of July, A.D. 1870, being a trader, to wit, a cotton broker, obtained from the said Michael Belcher under the false pretence of carrying on business dealing in the ordinary way of his said trade, certain property, to wit, twenty-five bales of cotton, on credit, and has not paid for the same, against the form of the statute in such case made and provided.

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Fourth count.—And the jurors aforesaid, on their oath aforesaid, do further present, that hereinafter and before the committing of the offence hereinafter mentioned, to wit, on the 16th day of August, A.D. 1870, a bankruptcy petition was presented against the said Pim Cherry, and the said Pim Cherry was thereupon, to wit, on the 26th day of August, A.D. 1870, adjudged bankrupt; and that the said Pim Cherry within four months next and before the presentation of the said bankruptcy petition against him, to wit, on the 26th day of July, A.D. 1870, being a trader, to wit, a cotton broker, with intent to defraud, obtained from the said Michael Belcher, under the false pretence of carrying on business in the ordinary way of his said trade, property, to wit, twenty-five bales of cotton on credit, and has not paid for the same, against the form of the statute in such case made and provided.

Herschell and *M'Connell* were for the prosecution.

Torr and *Gully* for the defence.

The first witness who was called was Mr. Bolland, the Registrar of the Bankruptcy Court at Liverpool, who produced the examination of the defendant in the above court. He admitted on cross-examination that a promise was made to the defendant or his attorney, before his examination took place, that it should not be filed, or used against him in any way.

Torr, therefore, objected to its production, on the ground of a promise to that effect having been made.

Herschell submitted it was admissible, as it was not a voluntary statement, but it was one he was bound to make by Act of Parliament, and that no such promise, therefore, could affect its admissibility.

MARTIN, B., overruled the objection, and held that the examination of defendant was admissible, saying if it had been made as a voluntary statement it would have been different, but here the defendant was obliged to submit to examination under the Act of Parliament.

The examination was then put in and read.

From the evidence it appeared that the defendant was a cotton broker, and had been in business in Liverpool for some years prior to 16th of August, 1870, on which day a petition that he should be adjudicated a bankrupt was presented against him, and on the 26th of the same month he was adjudicated a bankrupt. At that time his debts amounted to 9863*l.*, and his nominal assets to 891*l.*, the amount likely to be realised being 650*l.* On the 25th of July, *i.e.*, within four months prior to the petition for adjudication, the defendant went to a Mr. Belcher, who was also a cotton broker, and told him that he had come to buy certain bales of cotton that he had been speaking to his (Mr. Belcher's) son about. Mr. Belcher said he knew nothing about the matter, when the defendant replied that there was only a difference of a sixteenth between him and his son, and he would give the price his son wanted. Mr. Belcher then agreed to sell

the cotton, believing at the time that defendant was acting as broker for a principal. In about a quarter of an hour an order came for the delivery of the cotton in the bankrupt's own name. Mr. Belcher, having in previous transactions with defendant received the name of a principal, sent for Mr. Cherry, and told him he could not accept his name. Defendant replied that it was part of an order he had from a principal for sixty bales; that if he (Mr. Belcher) would give him delivery of the cotton, he (defendant) would pay for it at once, or within three days; that he had funds in hand, or their equivalent. Mr. Belcher then said, "Cherry, you are a young broker; I should not like to mar your prospects; if you give me your word of honour that what you say is true, you shall have the cotton." Defendant then assured him on his honour that what he had said was true, and that he had funds in hand, or the equivalent, which would come round in three days. Mr. Belcher, believing his statement to be true, and that he was acting as broker for a principal, allowed him to have the cotton, and twenty-five bales, to the value of 339*l.*, were delivered to defendant on the morning of the 26th. The bales were entered in defendant's book as having been bought on account of James Wilson. There was, however, no such person as James Wilson, and it was admitted that defendant was really buying the cotton for himself, and that there was no principal in the transaction. On the 26th of July, *i.e.*, the same day on which the cotton was delivered to him, the bankrupt went to the National Bank of Liverpool and pledged the twenty-five bales which he had received from Mr. Belcher, together with other bales, raising upon them a loan of 1600*l.* On the 28th of July defendant paid over to Mr. Matthews, another broker, the sum of 1600*l.* on account of certain Stock Exchange speculations, but this sum was found to be 600*l.* in excess of what he owed, and that amount was returned to him.

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The case for the prosecution being closed,

Torr submitted that, as the prosecution had given no evidence of guilty intent on the part of the prisoner, there was no case for the jury. Whenever the Legislature intended to change the onus of proof of intent from the prosecution to the prisoner, it does so in express words, and not by implication. For instance, the 41st section of 7 & 8 Geo. 4, c. 29, dealing with the possession of trees, is in these words: "Being found in possession of the same, and not satisfying the justices that he came lawfully by them." And the 19th section of the same Act, as to wreck, is to the same effect. Even sect. 11 of the Habitual Criminals Act (32 & 33 Vict. c. 99) does not, according to the cases of *Reg. v. Harwood* (11 Cox C. C. 388), and *Reg. v. Davis* (11 Cox C. C. 578), throw upon the prisoner the onus of proving that he had no guilty knowledge. Besides, the 18th section of the 32 & 33 Vict. c. 62, shows that the justices below are to examine and see if there be any evidence adduced before them (or as he, the counsel, would read the words, *anything* in the evidence adduced)

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to show that the act charged was not committed with a guilty intent.

MARTIN, B., however, overruled the objection.

MARTIN, B., then summed up the case as follows: The prisoner is indicted under sub-sects. 13 & 14 of sect. 11 of 32 & 33 Vict. c. 62, pt. 2. The first section under which he is indicted is sub-sect. 13. The section is this: "If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit, and has not paid for the same." Now, a false representation here means a fraudulent representation. A man may easily make a false representation without it being fraudulent—that is to say, if he does not know it to be false it is not fraudulent; but if he does know it to be false it is fraudulent. You must, therefore, find that he made the false representation knowing it to be false. The next section under which he is indicted is the 14th: "If within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, being a trader, obtains, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless the jury is satisfied that he had no intention to defraud." Now, a broker is a middleman who is acting for a principal, and he is by the contract made liable to the person with whom the broker is dealing. Now, the fraudulent representation here was that there was another man behind, whom he wanted to buy the cotton for. Now, it appears that was not so. In order, therefore, to convict the defendant you must be satisfied that he made, knowingly, a false representation to Mr. Belcher—that is to say, he went to Mr. Belcher to cheat him; it amounts simply to that. Did he go to Mr. Belcher to cheat him of his goods? And if it appears that the defendant pretended to be dealing in the ordinary way of his trade, whereas in reality he was not, then it is for him to satisfy you that he was acting honestly, and that he had no intention to defraud.

Guilty. Three months' hard labour.

CENTRAL CRIMINAL COURT.

February 1, 1871.

(Before MONTAGUE SMITH, J., and before T. CHAMBERS, Esq., Q.C.,
the Common Serjeant.)

REG. v. GEORGE BELL. (a)

The Vexatious Indictments Act (22 & 23 Vict. c. 17)—Its amendment by 30 & 31 Vict. c. 35, s. 1—Misdemeanours under the Debtors' Act, 1869 (32 & 33 Vict. c. 62)—Quashing count of indictment.

With reference to misdemeanours under the Debtors' Act, 1869, the provisions of the Vexatious Indictments Act must be considered as controlled by 30 & 31 Vict. c. 35, s. 1.

In considering the sufficiency of a recognizance to prosecute under sect. 1 of The Vexatious Indictments Act, reference may be made to the accompanying depositions to ascertain the particulars of the offence to be charged.

A count under the Debtors' Act, 1869, s. 13, sub-sect. 1, alleging simply that the defendant did obtain credit from the prosecutor "by means of fraud other than by false pretences," without setting out the means, will be quashed as being too general.

GEORGE BELL was indicted for offences committed under the Debtors' Act, 1869 (32 & 33 Vict. c. 62); the first count of the indictment being for unlawfully obtaining on credit, within four months of his bankruptcy, thirty-six tons of potatoes of John Read; second count, for a like obtaining of thirty tons of potatoes of Jonathan Read; third count, for obtaining credit (as to part of the goods in the first count mentioned) under false pretences; fourth count, for obtaining credit (as to the goods in the third count mentioned) by means of fraud other than false pretences.

Metcalfe and A. J. H. Collins prosecuted.

Sleigh, Serj., and Besley defended.

The case came, in the first instance, before Montague Smith, J., upon application made by defendant's counsel before plea taken, to quash the indictment, which was as follows:

(a) Reported by EDWARD T. E. BESLEY, Esq., Barrister-at-Law.

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Central Criminal Court, } The jurors for our Lady the Queen
to wit. } upon their oath present, that after
the making, passing, and coming into operation of the Bank-
ruptcy Act, 1869, to wit, on the thirtieth day of June, in the
year of our Lord One thousand eight hundred and seventy,
George Bell, a trader within the true intent and meaning of the
laws relating to bankruptcy in England, was in due form of law,
in pursuance of the said Act, adjudged bankrupt by the Court of
Bankruptcy in London, upon the petition of one John Read, then
presented to and duly filed of record in the said Court of Bank-
ruptcy; And the jurors aforesaid, upon their oath aforesaid, do
further present, that the said George Bell, within four calendar
months next before the presentation of the said bankruptcy
petition against him, in the year last aforesaid, whilst he was
such trader as aforesaid, under the false pretence of carrying on
business and dealing in the ordinary way of his trade, unlawfully
and fraudulently did obtain on credit of and from one John Read,
thirty-six tons weight of potatoes, of the property, goods, and
chattels of the said John Read, with intent to defraud the said
John Read of the same, and that the said George Bell has
not paid for the same property, goods, and chattels, against
the form of the statute in such case made and provided, and
against the peace of our said Lady the Queen, her crown and
dignity.

Second count.—And the jurors aforesaid, upon their oath afore-
said, do further present, that the said George Bell was adjudged
bankrupt by the said Court of Bankruptcy upon the petition of
the said John Read, as in the first count of this indictment
mentioned. And the jurors aforesaid, upon their oath aforesaid,
do further present that the said George Bell, within four calendar
months next before the presentation of the said bankruptcy peti-
tion against him, in the year last aforesaid, whilst he was such
trader as aforesaid, under the false pretence of carrying on
business and dealing in the ordinary way of his trade, unlawfully
and fraudulently did obtain on credit of and from one Jonathan
Read thirty tons weight of potatoes, of the property, goods, and
chattels of the said Jonathan Read, with intent to defraud the
said Jonathan Read of the same; and that the said George Bell
has not paid for the same last-mentioned property, goods, and
chattels, against the form of the statute in such case made and
provided, and against the peace of our said Lady the Queen, her
crown, and dignity.

Third count.—And the jurors aforesaid, upon their oath afore-
said, do further present, that the said George Bell, in the year
aforesaid, after the making, passing, and coming into operation
of the Debtors' Act, 1869, did request the said John Read to
supply him, the said George Bell, with a large quantity of goods,
to wit, potatoes, on credit, and did then, to wit, on the Fourteenth
day of May, in the year of our Lord One Thousand Eight Hun-
dred and Seventy, falsely pretend to the said John Read that

a certain banker's cheque and order for thirty pounds, bearing date the eleventh day of May then last, which the said John Read had before then received from the said George Bell, then when the said John Read so received the same was a good and valid order for the payment of the sum of thirty pounds; and that at the time when he, the said George Bell, so requested the said John Read to supply him with the said goods he, the said George Bell, was solvent, and able to pay for the same, by means of which said false pretences he, the said George Bell, on the said fourteenth day of May, did obtain on credit of and from the said John Read seventeen tons weight of potatoes, of the goods and chattels of the said John Read, whereas in truth and in fact the said banker's cheque and order was not a good and valid order for the payment of the sum of thirty pounds when the said John Read so received the same from the said George Bell, and whereas in truth and in fact at the time when he, the said George Bell so requested the said John Read to supply him with the said goods he, the said George Bell, was insolvent, and not able to pay for the same, all which premises he, the said George Bell, at the time he so falsely pretended as aforesaid then well knew; and so the jurors aforesaid, upon their oath aforesaid, do say that the said George Bell, in incurring such debt and liability to the said John Read, as in this count aforesaid, did obtain credit under false pretences, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown, and dignity.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that the said George Bell, after the making, passing, and coming into operation of the Debtor's Act, 1869, did incur a certain debt and liability to the said John Read to the amount of eighty-five pounds, and in incurring such debt and liability did obtain credit from the said John Read by means of fraud other than by false pretences, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown, and dignity.

The condition of the recognizance by which the prosecutors were bound over was as follows: "Whereas George Bell was this day charged before me, the said magistrate, for that he, in the said county of Middlesex, within the said Metropolitan Police District, and within the jurisdiction of the Central Criminal Court, did, within four months next before the presentation of a bankruptcy petition against him, unlawfully obtain on credit, under the false pretence of carrying on business and dealing in the ordinary way of his trade, certain property, to wit, forty tons of potatoes, and has not paid for the same, with intent to defraud. If, therefore, the said persons hereinbefore named, and acknowledging themselves as aforesaid, shall respectively appear at," &c., "and respectively give evidence upon a bill of indictment to be then and there preferred against the said George Bell for the

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offence aforesaid, then," &c. (*then follows usual clause to make void recognizance*).

"The said persons hereinbefore named" in the recognizance were the two prosecutors and the other witnesses in the case; and there was nothing on the face of the recognizance to show which persons were bound over to prosecute, and which to give evidence merely.

Sleigh.—The two first counts are under 32 & 33 Vict. c. 62 (Debtor's Act, 1869), s. 11, sub-sect. 14, and the two last counts under sect. 13, sub-sect. 1 of the same Act. By sect. 18 of that Act every misdemeanour under the second part of the Act (sects. 11 to 23 inclusive) shall be deemed to be an offence within, and subject to, the provisions of 22 & 23 Vict. c. 17 (Vexatious Indictments Act). The provisions of that Act have not been complied with, inasmuch as the prosecutor has not been bound over by recognizance to prosecute the defendant for the offences set forth in this indictment. The indictment must, therefore, be quashed. The prosecutor has been bound over by recognizance to prosecute some other offence than that charged in the indictment. In the recognizance there is not contained any condition according to the exigences of which the prosecutor is bound to prosecute the defendant for obtaining any property from any human being.

SMITH, J.—But the recognizance is in general terms, of course?

Sleigh.—Yes; but I contend that the offence with which he is charged must be committed against some person or property, and my objection to the recognizance is, that it does not contain any condition binding the prosecutor to prosecute the defendant for any offence committed against person or property. The two first counts of the indictment utterly fail to comply with the requirements of the Act.

SMITH, J.—I suppose the depositions show whose property it was.

Sleigh.—Now, as to the last two counts. The fourth count, I submit, is bad for uncertainty, and ought to be quashed on that ground alone; but my main objection to each count severally is that there is no recognizance whatever to satisfy the exigences of the statute, certainly as to the last two counts.

SMITH, J.—That is so, apparently, Mr. Metcalfe. The recognizance hardly maintains the last two counts.

Metcalfe.—That is quite so. As to those counts it entirely turns upon the construction of 30 & 31 Vict. c. 35, s. 1. They are warranted, as we say, by that statute.

Besley.—The recognizances are in general terms, and do not satisfy the requirements of the statute.

SMITH, J.—The recognizances are founded upon what takes place before the magistrate, and the defendant would know by the depositions what he was called upon to answer. The only question here is whether it is a sufficient recognizance on which the prosecutor, if he failed to prosecute, might have been called

upon to pay the money. If it is sufficient for that purpose, then he was bound over.

Besley.—Except that in this particular case it is the duty of a magistrate, after hearing the evidence, to take into consideration anything tending to show that the act charged was not committed with a guilty intent (32 & 33 Vict. c. 62, s. 18), so that the depositions may contain a dozen different acts, with regard to eleven of which the magistrate may believe there is no guilty intent, and we only know what the opinion of the magistrate is by looking at the recognizances. There must be an identity between the recognizances and the indictment, and there is none here. With regard to the Act 30 & 31 Vict. c. 35, s. 1, the Debtors' Act (32 & 33 Vict. c. 62, s. 18) expressly says that the former Vexatious Indictments Act (22 & 23 Vict. c. 17) shall apply. The Debtors' Act was passed subsequently to the Act 30 & 31 Vict. c. 35. It refers back to the original Vexatious Indictments Act. It passes over in silence the Act 30 & 31 Vict. c. 35, and by that silence, we contend, it entirely excludes the right to incorporate the provisions of the latter Act with the Debtors' Act. If, however, the Act 30 & 31 Vict. c. 35, s. 1, does apply, then it is important also to notice sect. 2 of that Act, which empowers the Court before which any indictment preferred under the provisions of sect. 2 of the Vexatious Indictments Act (22 & 23 Vict. c. 17) may be tried, to order the costs of the defence to be paid by the prosecutor in the event of an acquittal. It is, therefore, important that the recognizances should clearly show who is the prosecutor, in order that the Court may know who shall pay the costs. He cited *Reg. v. Fridge* (9 Cox C. C. 430).

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SMITH, J.—That is an authority that, in the present state of the proceedings, I might quash the counts I think not justified by the recognizances.

Besley.—Undoubtedly ; but the Court is left to decide which counts are justified by the recognizances.

SMITH, J.—My present impression is that the two last counts are not within the terms of the recognizances. Unless Mr. Metcalfe can satisfy me that the Act 30 & 31 Vict. c. 35, s. 1, applies they must be quashed.

Metcalfe.—I quite agree to that ; unless it does we cannot support these counts, but it does so apply. That section provides that the provisions of the 1st section of the Vexatious Indictments Act (22 & 23 Vict. c. 17) “shall not extend or be applicable to prevent the presentment to, or finding by, a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment,” &c. The Vexatious Indictments Act is absolutely controlled and must be read by the light of this provision. *Pro tanto* it repeals the Vexatious Indictments Act. It provides that the Vexatious Indictments Act shall not prevent the placing

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before a grand jury of any count in the indictment, if such count be founded on the facts in the depositions.

SMITH, J.—Yes, there is no doubt that, if this case is within the 1st sect. of 30 & 31 Vict. c. 35, I must say whether the counts are founded on the facts and evidence disclosed in the depositions. Assuming that Act applies, what do you say as to that? Are the facts in the depositions?

Metcalf.—I don't think my friend will dispute that.

Sleigh.—Upon that I shall not trouble your lordship. I shall probably agree with my friend that that may be so.

Metcalf.—Then I may take it that it is the opinion of the Court that all the counts are supported by the facts as they appear on the depositions?

Sleigh.—No; I don't concur in that. I shall point out that you have no power at all under this Act.

SMITH, J.—That is the only point in issue, whether this Act for the purposes of this prosecution under the Debtors' Act, 1869, is controlled or repealed by the subsequent Act.

Metcalf.—Quite so. I submit that nothing can be stronger than the words of the section. It limits the effect of the former Act, which is, in fact, a repealing of it *pro tanto*. No doubt, if the Act 30 & 31 Vict. c. 35 had not been in existence the first Act would have stood unrepealed and unlimited; but, as the second Act has limited the first, it has so far repealed it, and it therefore gives power to the prosecution to take those counts before the grand jury.

Sleigh submitted that the true interpretation of 30 & 31 Vict. c. 35, s. 1, was that an indictment may now be preferred in respect of any charges which might be substantiated by the evidence disclosed on the depositions, if, in the opinion of the Court, those charges are such as may be lawfully included in one indictment.

SMITH, J.—It seems to me that the second part of that section extends much wider than the first. It means that nothing shall be applicable to prevent the finding of any bill of indictment founded upon the facts disclosed in the depositions. The Court might consent to allow counts to be put in which are not founded on the depositions. My own view is that these two parts of the section are distinct, only one is much more general than the other. The first part requires that the counts must be founded upon the facts in the depositions, otherwise the bill ought not to be preferred. But the second part, which relates to the previous consent of the Court before the bill goes up to the grand jury, includes counts which may not be founded on such facts. There is a wider and a larger range, therefore, given to the latter than to the former part of the section. However, this is not an application under the latter part of the section but under the former, and therefore the counts may now be lawfully joined with the rest of the indictment if they are founded on the facts and evidence disclosed in the depositions, as is admitted to be the case. It is impossible to say that there is not some doubt on the

question whether the 1st section of the Act 30 & 31 Vict. c. 35, is to be read with the Vexatious Indictments Act for the purposes of the 18th section of the Debtors' Act, 1869, but, on the whole, I think I shall hold for the purposes of to-day that it is included. As Mr. Metcalfe puts it, the Vexatious Indictments Act is, to a certain extent, repealed by the Act 30 & 31 Vict. c. 35, s. 1. If so they must be read together. I can't say there is not a doubt upon it; but, for the purposes of to-day, I shall so decide, and shall hold that, within the last-mentioned Act, the third and fourth counts are founded on the facts appearing in the depositions, and may lawfully be joined. With regard to the fourth count, I think that is too general, and ought to be quashed.

Fourth count of indictment quashed accordingly.

The trial of the case upon the first three counts of the indictment then proceeded before the Common Serjeant.

It appeared from the evidence of the prosecutor, John Read, a potato merchant carrying on business at Blackpool, Lancashire, that he had done business for some years with the defendant, who resided in the Caledonian-road, London. On the 9th of May then last a balance of 30*l.* 1*s.* 6*d.* was due to prosecutor from defendant for potatoes previously supplied. On that date prosecutor received a telegram from defendant, in consequence of which a further quantity of 18 tons 19 cwt. of potatoes, value 107*l.* odd, was sent to defendant on different occasions between that date and the 14th of May, a truck-load at a time. On the 12th of May prosecutor received from defendant a cheque for 30*l.* (the order referred to in the third count of the indictment), in part payment of the old balance of 30*l.* 1*s.* 6*d.* This was paid into prosecutor's bankers on the same day, and returned dishonoured on the 19th of May. Before the return of this cheque prosecutor received a letter from defendant, in consequence of which he sent him 17 tons more of potatoes, value 100*l.*, and on the 20th of May received another cheque from defendant for 100*l.*, which was returned dishonoured on the 25th of May. Prosecutor then deposed: "I should not have allowed my potatoes to go if I had known the cheques would have been dishonoured, or if I had known the 30*l.* cheque would have been dishonoured;" although, as will be observed from the above statement of his evidence, it appeared that the greater part of the first lot of potatoes had been sent off before the arrival of the 30*l.* cheque.

The circumstances under which the defendant obtained the potatoes mentioned in the second count from the prosecutor, Jonathan Read (a brother of the other prosecutor, also carrying on business as a potato merchant at Blackpool, but separately on his own account), were similar to those above detailed, except that, in this case, all the potatoes had been sent off by prosecutor before any cheque was received by him from defendant. This prosecutor also had done business with defendant for some years.

From the evidence of the defendant's banker it appeared that

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defendant had had a banking account for some years, which was still open in the month of May in question, although overdrawn. Defendant had at different times been permitted to overdraw his account, and been charged interest for it. At times that overdraft amounted to several hundreds of pounds, which was afterwards honourably replaced by him—at one time to the extent of between 900*l.* and 1000*l.* It was, however, against the rules of the bank to have overdrawn accounts at all; and, on the 18th of April, 1870, the manager had written to defendant, requesting him not to draw cheques unless he were prepared to meet the same on presentation; and in fact several cheques were returned to defendant unpaid, both before and after the date of that letter.

Other evidence having been given,

Sleigh submitted, on the authority of *Reg. v. Boyd* (5 Cox C. C. 502), that there was no case to go to the jury.

Metcalfe did not rely upon the count for false pretences, but contended that there was evidence for the jury that the defendant obtained the goods not intending to treat them in the ordinary course of business, and not intending to pay for them.

The COMMON SERJEANT could not say that there was no evidence, but was of opinion that there was really none that the defendant obtained the goods under a false pretence of carrying on business in the ordinary course of trade; but the case should proceed if the jury desired it.

The jury, however, stated that they had made up their minds, and found the defendant

Not guilty.

CENTRAL CRIMINAL COURT.

March 1, 1871.

(Before the Right Hon. RUSSELL GURNEY, Esq., the Recorder.)

REG. v. MARTHA TORPEY. (a)

*Feme covert—Crime committed by—Coercion.**The doctrine of coercion, as applicable to a crime committed by a married woman in the presence of her husband, only raises a disputable presumption of law in her favour, which is in all cases capable of being rebutted by the evidence.**This disputable presumption of law exists in misdemeanours, as well as in felonies, and the question for the jury is the same in both cases.**The doctrine in question applies to the crime of robbery with violence.**Semble: Where a man and woman are indicted together for a joint crime, and it appears from the evidence for the prosecution that they had lived together for some months as husband and wife, having with them an infant who passed as their child, it is not necessary for the woman to give evidence of her marriage in order to entitle her to the benefit of the doctrine of coercion, although the indictment does not describe her as a married woman.*

MARTHA TORPEY was indicted, with one Michael Torpey, for a robbery with violence committed by them together upon James Unett Parkes, and stealing from his person two diamond necklaces and other articles of jewellery, the goods of William Henry Ryder.

The second count of the indictment described the goods as being, at the time of the robbery, in the possession and under the control of the said J. U. Parkes.

The third count charged both prisoners with feloniously receiving the property, knowing it to have been stolen.

The male prisoner was not in custody, and the female prisoner was, therefore, tried alone. In the gaol calendar she was described as a married woman, but this did not appear on the face of the indictment, which contained no description of either prisoner.

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Metcalf and *Straight* for the prosecution.

Montagu Williams and *Horace Brown* for the defence.

The facts of the case, as appearing from the evidence, were as follows :—

The prosecutor was an assistant to Messrs. London and Ryder, jewellers, of New Bond-street. On the 12th of January last, in consequence of an order given to his employers, he went with some jewellery to the value of over 5000*l.* to a house, No. 4, Upper Berkeley-street, W. He reached the house about half-past five o'clock in the evening, and the door was opened by Michael Torpey, who had given the order for the jewellery at the shop. Michael Torpey apologised for the absence of the servant; asked prosecutor to leave his hat in a room on the ground floor, and then to follow him (Torpey) to the drawing-room. There they were joined by the prisoner, Martha Torpey, and prosecutor took out of a bag part of the jewellery, and, placing it on the table, began to show it to the two prisoners, keeping the remainder of the jewellery in his bag under the table. The two prisoners were together on the other side of the table, and as they examined the jewels the value of each article was explained.

The male prisoner admired a necklace worth 1100*l.*, and said he should like to have either that or one valued at 570*l.*, but that he thought he should like to consult his wife's sister before a decision was come to. He told the female prisoner to call her sister, and she left the room apparently for that purpose. The male prisoner continued standing at the table in the same position as before, and prosecutor remained with his back to the door. In about a couple of minutes the female prisoner returned, and said that her sister would be there directly. She then came quietly behind prosecutor, and placed a handkerchief saturated with something over his face and mouth, whilst the male prisoner rushed at him and clasped him round the arms in front. They struggled together for two or three minutes, the female prisoner constantly applying the handkerchief to prosecutor's face, who, after a short time, became unconscious, and was forced by the prisoners on to a sofa.

On returning to complete consciousness prosecutor found himself lying on the sofa, bound with straps. Both prisoners had then left the house, taking with them all the jewellery which had been placed on the table, except a small gold chain.

The house in Berkeley-street had been taken at a weekly rent by the male prisoner from a house agent, to whom he represented his name as Tyrrell, and gave a reference to an hotel-keeper at Bath. The reply to the reference, in consequence of which the male prisoner was allowed to engage the house, was as follows :

“ Bath, Royal Hotel,

“ Le 10 Jan., 1871.

“ M. de Madaillon (being imperfectly acquainted with the English language) has requested me to acknowledge and reply to

your letter. We have known Mr. Tyrrell for some years in Paris, and I have no hesitation in assuring you that any engagement into which he may enter with you will be honourably fulfilled.

"I am faithfully yours,

"EMILY DE MADAILLON."

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This letter was proved to be in the handwriting of the female prisoner.

On the afternoon of the robbery both prisoners arrived at the house in Berkeley-street in a cab; they had no luggage. Shortly afterwards the only servant in the house was sent out by the female prisoner with a letter directed to some fictitious Miss Pearson at Tulse-hill, and the servant's unsuccessful search for this person kept her fully occupied until after the robbery had been completed. On her return the house was in the possession of the police. The direction on the envelope of this letter was also proved to be in the handwriting of the female prisoner.

The two prisoners had been living together as husband and wife since the month of June previously at the house of a Miss Pitt at Leamington. They had with them an infant whom they treated as their child. On the 9th of January the male prisoner went to London. On the 11th the female prisoner received two telegrams at Leamington. On the morning of the 12th (the day of the robbery) she left for London, stating that she might not return that evening, in which case she would send a telegram. On the evening of the 12th Miss Pitt received a telegram from her, and about two o'clock on the morning of the 13th both prisoners returned together, and the male prisoner left in a day or two and went abroad, leaving the female prisoner at Leamington, where she was shortly afterwards apprehended.

On the 15th of January a relative of the female prisoner received from her a parcel (containing part of the stolen property) with a letter, asking the former to take charge of the parcel for a time. This letter also was in the handwriting of the female prisoner.

Metcalf, in opening the case to the jury, said the question which would be raised by the defence would be whether the prisoner had acted under the coercion of her husband. The doctrine of coercion had been to some extent misunderstood in some of the earlier cases quoted in books of law; but in these days of civilisation a different construction was put upon it. The question the jury would have to consider was, whether the woman acted under the coercion and influence of her husband in such a way as to free her from all liability, or whether she herself committed certain acts of violence of her own will and accord, which rendered her clearly liable for the consequences. Whilst there was a strong presumption in favour of a married woman that she had acted under the influence of her husband, that was very easily to be rebutted by showing that she took active steps towards the perpetration of the crime. For instance, letters

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might be written by her independently of the will of her husband (as was, he submitted, the case here), and that would take her away from his influence and control. In this case the prisoner committed the first act of violence by placing the handkerchief over the face of the assistant, whilst her husband completed the act and stole the jewellery. There was nothing to show that he compelled her to commit an act of violence, or that she was under his coercion at the time.

Williams submitted there was no case to go to the jury. The prisoner was undoubtedly a married woman, and no question would arise as to that—indeed, the case for the prosecution was so opened to the jury by Mr. Metcalfe; and he should ask whether, considering the law as defined by the different authorities, she was not entitled to an acquittal. The prisoner, to all appearance, was acting under coercion; she was, in fact, under the influence and control of her husband, and therefore was not responsible for her conduct. He referred to the case of *Reg. v. Oruse* (8 C. & P. 541, and 2 Moody C. C. 53), and the various cases there cited, including particularly that of *Reg. v. Archer* (1 Moody C. C. 143) as an authority for the proposition that, even if the woman had been proved to have taken a more active part than her husband, she would not be liable to be convicted of this charge, but would be absolved on the ground of control.

The RECORDER overruled the objection, and the case was ordered to proceed.

Metcalfe argued that if the woman committed an act voluntarily, such as writing the letter of reference, she was responsible, and was punishable just the same as if she were a *feme sole*.

Miss Pitt, being recalled, said that the male prisoner was away from Leamington for several days, and might not have been in company with the female prisoner at the time the letter of reference was written.

Williams said that letter was dated from Bath. There was no evidence to prove that the female prisoner was ever there.

Straight said that it was perfectly clear that, in cases where violence was used, the wife was as responsible as the husband.

The RECORDER.—It is perfectly clear that the presence of the husband raises only a *prima facie* presumption, which is capable of being rebutted by the evidence in particular cases.

Williams then addressed the jury upon the question whether on the facts proved the prisoner was acting under her husband's control or not.

The RECORDER, in summing up the case, told the jury that they must not suppose they were called upon to come to a different conclusion in this case, in consequence of the absence of the husband, from that which they would otherwise have come to. He had to lay down the law to them precisely in the same way as if the husband were then standing by the side of the accused. The presumption of law was that if an act of dishonesty were committed by a wife in the presence of her husband, she was

acting under his control and coercion; but that presumption might be rebutted by acts otherwise committed by her. The question for their consideration was, whether the part taken by the prisoner showed that she was exercising her own free will, and was not coerced by her husband at the time. He then referred to the evidence, and observed that, with respect to sending the letter of reference to the house agent, and the one by the servant to Tulse-hill, it certainly had not been proved that the husband was present on either of those occasions. If, in the opinion of the jury, the woman was acting under coercion and control, the balance of authority was in her favour, and she would be entitled to an acquittal. The cases, however, were not unanimous on the subject. He must object to the doctrine that a wife was always bound to obey the dictates of her husband. A woman certainly was not to do a wicked act simply because her husband directed her to do it. The simple question was, aye or no, did the jury believe that the woman, either in procuring the handkerchief and forcing it upon the prosecutor's mouth, or in writing the letters and sending the servant to Tulse-hill, or in any other act done by her, was exercising an independent will, or was she acting throughout under her husband's coercion.

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The jury returned the following verdict:—"We are of opinion that the whole matter was pre-arranged by the husband, and that the prisoner acted under his coercion and control at the time."

Not guilty.

Metcalf said there were other indictments against the prisoners; one was for the misdemeanour of an assault upon the prosecutor, occasioning him actual bodily harm, and he proposed to proceed with that case.

Williams urged that if evidence were given on this indictment the same point would arise.

Metcalf contended that Hawkins and other text writers drew a distinction on this point between cases of felony and cases of misdemeanour only. Indeed, this distinction was drawn in the case of *Reg. v. Cruse*, already cited.

Williams contended that no such distinction existed. He referred to *Reg. v. Price* (8 C. & P. 19), where the acquittal of a woman was directed who had been jointly indicted with her husband for a misdemeanour in unlawfully uttering counterfeit coin.

The RECORDER (after consulting Mr. Baron Bramwell) stated that he should have to leave this case to the jury in the same way as the last, whereupon

Metcalf said he should not offer any evidence.

Not guilty.

COURT OF CRIMINAL APPEAL.

*January 28, 1871.**(Before BOVILL, C.J., CHANNELL, B., WILLES, J., BYLES, J., and
PIGOTT, B.)**REG. v. LONDON.(a)**Perjury—Indictment—Evidence.**An indictment for perjury charged that prisoner swore on a plaint in the County Court for the price of coals obtained on credit at different times, in which it was a material question whether or not the prisoner had received any coals on credit from P., either on account of himself or A., "that he had never received any coals on credit from P., either on account of himself or A. :"**Held, that the allegation in the indictment was not too general, although no specific instance was averred in which the prisoner had received coals on credit from P.**At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or that of A., have any coals on credit from P., to which the prisoner always answered, "I did not."**Held, that the prisoner's attention was sufficiently called to the subject so as to found a charge of perjury upon the answer, although no distinct transactions on credit were suggested to him during his examination.***C**ASE reserved for the opinion of this Court by the Common Serjeant of the City of London.

At a session of the Central Criminal Court held on Monday, the 9th of January, 1871, William London was tried before me on an indictment for perjury, which alleged that an action against Hannah London, at the suit of Michael Pass, was tried in the Lambeth County Court on the 6th of December, 1870, and that upon the trial of that action the said William London appeared as a witness, and was duly sworn, &c.; and that upon the said trial of the action it became and was a material question whether or not he the said William London had received any coals on credit from the said Michael Pass on account of the said H. London, and whether he the said William London had received any coals on credit from the said Michael Pass, either on account of himself or the said H. London, and that while it was so material he the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

said William London wilfully, falsely, and corruptly swore upon the trial of the said action, "that he had never received any coals on credit from the said Michael Pass, either on account of himself or his mother, the said H. London."

Collins, on behalf of the defendant, objected, upon the authority of the case of *Reg. v. Stolady* (1 F. & F. 518), that a general allegation such as that made by the defendant, and averred in the indictment, was not sufficiently precise to found or support an indictment for perjury, and that the whole of the defendant's evidence should have been set out and proved.

I overruled the objections, and the defendant was found guilty. I deferred sentence, and discharged the defendant on recognizance with sureties for his appearance to receive judgment, and in deference to the decision of the learned Judge in *Stolady's* case, reserved for the consideration of the Court for Crown Cases Reserved the questions raised as above by the defendant's counsel.

The following is a copy of the evidence given before me on the trial for perjury.

THOMAS CHAMBERS,
Common Serjeant of London.

Henry Devereaux Pritchard, high bailiff, Lambeth County Court, saith: I produce certified copies of the proceedings in *Pass v. London* (put in). I have also the original summons and papers annexed. Judgment for defendant. No person would be examined without being sworn.

Cross-examined: I don't remember anything about the case. Elworthy (attorney) appeared for plaintiff. Defendant's daughter appeared for her.

John Mason, usher, Lambeth County Court, said: I know defendant by sight; I remember the adjourned hearing of *Pass v. London*. I saw defendant in the witness box. I believe he was sworn, but don't remember it. I heard him asked, "Did you ever have any coals, either on your own account or your mother's, on credit?" He answered in the negative. The question was repeated, and he denied it again.

Cross-examined: The attorney said, "Will you swear you never had any coals," &c. The questions I have mentioned were not the only questions put. The question may have been, "Will you swear that neither you nor your mother had these coals on credit?"

Joseph Wilson, coal merchant, 13½, High-street, Vauxhall, foreman to Pass & Co., or manager: Had the sole control of everything. I frequently saw the defendant on the premises ordering coals. He generally bought coals for cash, but he has ordered them on credit. Coals ordered are entered on a ticket, of which there is a duplicate, and upon which it appears whether or not the coals are paid for. I saw this ticket of the 21st of March handed to defendant. It was made out by the ticket boy. I see by it that the coals were not paid for. I was present at the transaction. I said to defendant, "How is it, as you generally

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pay cash, there are notwithstanding several instances of your not paying?" He said, "My mother is not always in the way; but I will call and settle them altogether." He had no credit after the 21st of March. The tickets were entered in the day-book in the usual course of business, and the entries therein tally with the tickets. The coals supplied on the 21st of March have never been paid for. I frequently spoke to defendant on the subject of the claim made against his mother. I said, "Your mother repudiates the debt, and says it is owing by you." He said, "My mother gave me the money to pay, but I have spent it;" and he has repeatedly promised to pay it, or a portion of it, but has not kept his word. I was present at the court on the 6th of December, and heard defendant examined. I saw him sworn. I heard him asked, "Did you at any time, either on your own account or that of your mother, have any coals on credit." He said, "I did not;" a direct negative. The question was repeated, same words, and he denied again. The judge put the question first, and he denied it. When the answers were repeated the attorney said, "I can't carry the case any further."

Cross-examined: "Will you swear that neither you nor your mother had these coals on credit?" was not the question. There is a cash-book. Davis keeps the day-book. The judge did not say the books were badly kept. The books were not produced. He said our system of doing business was irregular. I don't think I mentioned about prisoner's saying he had had the money and spent it before to-day. I never told my attorney.

Re-examined by me: The prisoner promised to pay fifty times over.

George Davis saith: I was in the employ of Pass & Co. I often saw defendant on the premises ordering coals. I wrote out tickets—all these—and I handed them to defendant. If the coals are paid for, "paid" is put on the ticket: some of these (three) are marked "paid," the rest not; and they all tally with the counterfoils. Defendant had goods on credit and for cash on the same day sometimes. He generally paid cash, but on several occasions he had credit. I often heard Wilson ask defendant, and I have asked defendant himself for payment, and he made an excuse he would pay next week; once he said he was going to see an aunt and he would get some money, and he would pay when he came back. We gave credit to the mother. I delivered an account to her.

Cross-examined: I took all the money. We had accounts with defendant and his mother. Wilson started in business on his own account in September. Pass took money for coals and handed it to me.

James Strickland saith: I was foreman and weigher to Pass and Co. I have seen defendant purchasing coals many times; a ticket was brought to me for delivery of coals, and I entered the barge or wharf upon it. If "paid" was not on the ticket I used to say, "Well, Bill, credit again?" and he used to say, "Yes,

you b——y fool ;” that happened several times. Defendant never paid me for any coals on the days named. If he paid me I always put “paid” on the ticket. At the County Court defendant was asked if he had ever had any credit for himself or his mother. He said “No,” and was asked several times and made the same answer.

Cross-examined: He may have had credit from fifty to one hundred times for himself or his mother during three years. The question was “any coals,” not “these coals.”

Thomas, for the prisoner.—The objection taken at the trial was well founded. In *Reg. v. Stolady* it was held that it is not a sufficiently precise allegation upon which to found an indictment for perjury that the prisoner swore that a certain event did not happen between two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place. [BOVILL, C.J.—The word “allegation” in the marginal note in that case does not mean the allegation in the indictment, but what took place at the former trial.] Here the prisoner’s attention should have been called to the occasion on which he was alleged to have bought coals on credit, and the mere general question and denial was not sufficient. So in *Rex v. Hepper* (1 Car. & P. 608), where an insolvent debtor had sworn that his schedule contained a full, true, and perfect account of all debts owing to him at the time of his petitioning for his discharge, it was held that an assignment of perjury on that oath stating that whereas in fact the said schedule did not contain a full, true, and perfect account, &c., is too general, and that it ought to have stated what debts he was charged with omitting. In an indictment for false pretences a similar general form of allegation has been held bad: (*Rex v. Perrott*, 2 M. & S. 379.)

Thorne Cole, for the prosecution, was not called upon.

BOVILL, C.J.—We are all of opinion that this conviction was good. The first question is upon the form of the indictment, that is sufficient in our opinion. *Reg. v. Stolady* does not interfere with our decision. The second point is whether the attention of the prisoner was sufficiently called to the transaction he was being questioned about, and we are all of opinion that it was amply called to it, even if the second point has been reserved for us.

WILLES, J.—We do not intend to overrule what Pollock, C.B., said, that the attention of a witness ought to be called to the point upon which his answer is supposed to be erroneous before a charge for perjury can be founded upon it. Mr. Graves, in his last edition of *Russell on Crimes*, makes some observations on *Reg. v. Stolady*, which are in accordance with the judgment of the Lord Chief Justice.

The rest of the Court concurring,

Conviction affirmed.

Attorney for the prosecution, *Elworthy*.

Attorney for the prisoner, *S. N. Cooper*.

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April 22, 1871.

(Before BOVILL, C.J., MARTIN, B., BRAMWELL, B., BYLES, J., and
BLACKBURN, J.)

REG. v. THOMAN.(a)

*Indictment—Malicious injury—Statement of the amount of damage
done.*

*In an indictment under 24 & 25 Vict. c. 97, s. 51, for maliciously
damaging personal property, the damage exceeding 5l., it is not
necessary to allege the value of each article injured, but only that
the amount of the damage done to the several articles exceeded 5l.
in the aggregate.*

CASE reserved for the decision of this Court.

At the General Quarter Sessions of the Peace holden by adjournment at St. Mary, Newington, in and for the county of Surrey, on Monday, the 6th of February, 1871, Margareth Thoman was tried and convicted upon the following indictment:

Surrey.—The jurors for our lady the Queen upon their oath present, that Margareth Thoman, on the 30th of January, 1871, in and upon three frocks, six petticoats, one flannel petticoat, one flannel vest, one pinafore, one jacket, one pair of knickerbockers, one flannel night-gown, one woollen cape, one sash, one tablecloth, one sheet, three hats, and one brooch of the value of twenty pounds, and of the property of Gilbert Alder, unlawfully and maliciously did commit certain damage, injury, and spoil to an amount exceeding five pounds, by unlawfully and maliciously cutting and destroying the same against the form of the statute in such case made and provided.

At the trial the prisoner's counsel objected that the indictment was bad, because the value of the articles damaged was ascribed to them collectively and not individually, and he contended that the value of each class of article ought to have been stated separately.

The Court overruled the objection, but reserved the point for

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

the decision of the Court for consideration of Crown Cases Reserved.

Judgment upon the prisoner was respited until the decision of such court should be known, and the prisoner was committed to the custody of the governor of the common gaol at Newington, in the said county.

WM. FREDK. HARRISON, Chairman.

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Morgan Thomas (*Poulter* with him) for the prisoner.—By the 24 & 25 Vict. c. 97, s. 51, “whosoever shall unlawfully and maliciously commit any damage, injury, or spoil upon any real or personal property, &c., to an amount exceeding 5*l.*, shall be guilty of a misdemeanour.” Value, therefore, is of the essence of the offence, and a value should be put on each article alleged to be injured in the indictment. In *Rex v. Forsyth* (Rus. & Ry. 274), the prisoner (a bankrupt) was indicted under the Bankruptcy Act for concealing property to the amount of 20*l.*, and the value was ascribed to all the articles collectively, and it was held necessary to make out the offence as to every one of the articles. [MARTIN, B., referred to the 14 & 15 Vict. c. 100, s. 23, which enacts (*inter alia*) that no indictment shall be insufficient for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil in any case where the value or price, or the amount of damage, injury, or spoil is not of the essence of the offence.] That does not apply where value is of the essence of the offence, as in this case. [BOVILL, C.J.—The amount of damage is of the essence of the offence here, and not the value of the several articles damaged.] In *Reg. v. Williams* (9 Cox C. C. 338), it was held that damage committed at several times in the aggregate, but not at any one time exceeding 5*l.*, will not sustain an indictment under 24 & 25 Vict. c. 97, s. 51.

Royle, for the prosecution.—The value of the articles damaged is not the essence of the offence, but the amount of the damage done is.

BOVILL, C.J.—We are all of opinion that it was not material to allege the value of the several articles in the indictment, but only to allege that the amount of the damage exceeded 5*l.* The conviction must therefore be affirmed.

The rest of the Court concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 22, 1871.

(Before BOVILL, C.J., MARTIN, B., BRAMWELL, B., BYLES, J., and BLACKBURN, J.)

REG. v. BAILEY.(a)

Embezzlement—Olerk and servant—Traveller and collector.

The prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary, but was paid by commission. The prisoner might get orders when and where he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time—the whole of every day, to their service :

Held, that the prisoner was a clerk and servant within the embezzlement clause, sect. 68 of 24 & 25 Vict. c. 96.

CASE reserved for the decision of this Court.

The prisoner was tried before me at the Michaelmas Quarter Sessions of the peace, holden by adjournment at Sheffield, in and for the West Riding of the county of York, on the 28th of November, 1870, upon an indictment which charged him with having feloniously embezzled several sums of money, the property of Joseph Hall and another, his masters.

The prosecutors, the said Joseph Hall and Charles Hazlehurst Greaves, who carried on business in partnership in Sheffield as brewers and wine and spirit dealers, under the firm of William Greaves and Company, employed the prisoner from 1861 to 1866 as traveller and bookkeeper, at a weekly wage of 15s. The prisoner then left the prosecutors' service and took other employment.

About three years after this the prisoner was again engaged by Messrs. Greaves and Company on a fresh agreement. The terms (which were not in writing) are stated in the evidence of Joseph Hall to have been as follows :—

The prisoner was employed as traveller to solicit orders for,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

and to collect the moneys due on the execution of such orders by, the firm, and to pay over to the said Joseph Hall, or to Charles Haslehurst Greaves, or to the clerk at the brewery in Sheffield, the total net amount of the moneys so collected by the prisoner on the evening of the day when such moneys were so received by him, or on the day following, in case the prisoner should then be travelling at a distance from the brewery. In case the prisoner had neither received money nor obtained orders, he was not expected to go to the brewery that day, but when he came there it was his duty to enter in the cash book of the firm the name and address of the customer from whom he had received any money, the amount, the date of the receipt, and the discount allowed (if any) to the customer, and to pay over to the firm the net amount of the money received by him, the discount being deducted. Every three months the prisoner had an account given to him of the various sums then owing by the customers to the firm, and it was the prisoner's duty to deliver these accounts, and apply for payment from the customers on presenting them. In case such accounts were not paid, the firm enforced payment thereof. The prisoner had no authority to retain in his hands moneys belonging to the firm. He had to travel in the town of Sheffield and neighbourhood. His district comprised about six miles round Sheffield, and included the town of Rotherham. He was to be exclusively in the employment of the firm, to whom he was to give the whole of his time—the whole of every day. The prisoner had no salary, but was paid by a commission of 5 per cent. on all orders for goods he obtained for the firm, and an additional 5 per cent. on the amount of cash collected by him on payment by the customers for the goods supplied by the firm on such orders. The firm were to pay to the prisoner his commission every week, but this was not always done with regularity, and the prisoner was not always regular in his attendance at the brewery, and, although the firm complained of his irregularity, they did not discharge him.

It was further stated by Joseph Hall on cross-examination, that the prisoner could get orders when and where he pleased within his district, and that he had to collect money as soon as he could, and as he chose. His duty was to go to both old and new customers of the firm, and to collect money when and where he thought proper; he was not bound by particular orders, he was at liberty to dispose of his time as he pleased, but he was to employ the whole of it in the service of the firm.

It was proved and admitted by the prisoner on the 21st of October that he had retained in his hands, and had not accounted for, several sums of money which he had received from the firm by virtue of the before-mentioned employment; the three sums charged in the indictment had been received by the prisoner on the 26th of May, the 1st of June, and 26th of August respectively.

During the course of the case the counsel for the prisoner called my attention to *Reg. v. Bowers* (L. Rep. 1 Cr. Cas. Res. 45; 10 Cox C. C. 250), and at the close of the case for the prosecution

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it was contended that the prisoner was not a clerk or servant to the prosecutors within the meaning of the stat. 24 & 25 Vict. c. 96.

I declined to stop the case, and directed the jury to decide whether the prisoner had been proved by the evidence of Joseph Hall to be a servant to the prosecutors or not.

The jury found the prisoner guilty, judgment being respited until the opinion of the Court of Criminal Appeal is pronounced upon the above objection, and defendant is on bail.

The question for the opinion of this Honourable Court is, whether the prisoner, under the circumstances herein stated, was a clerk or servant to the prosecutors, so as to be liable to be convicted of the crime of embezzlement.

WALTER SPENCER STANHOPE, Chairman.

No counsel appeared to argue for the prisoner.

Forbes, for the prosecution.—The conviction was right. This case is distinguishable from *Reg. v. Bowers*, where the prisoner was paid by commission, and was at liberty to get orders or not, as he pleased, for in the present case the prisoner was bound to devote the whole of his time to the prosecutors' service. In *Reg. v. Turner* (11 Cox C. C. 551) it was held by Lush, J., that a traveller who was bound to "diligently employ himself in going from town to town in England, Ireland, and Scotland, and soliciting orders for the prosecutor, and who was not without the prosecutor's written consent to take or execute any order for vending or disposing of similar goods to the prosecutors for or on account of himself or any other person, and who was to be paid by commission, and to render weekly accounts," was a clerk or servant within the 24 & 25 Vict. c. 96, s. 68. [BRAMWELL, B.—The effect of the agreement here is that the prisoner was not to be told how he was to work, but still he was to work. BLACKBURN, J.—He was a servant to do this kind of work, but might use his own discretion as to the way of doing it.] In *Bower's case* it was optional with the prisoner whether he got any orders at all. [BOVILL, C.J., referred to *Reg. v. Tite* (L. & C. 13; 8 Cox C. C. 458). A traveller paid by commission and employed to get orders and to receive payments was held to be a clerk or servant, although he was at liberty to receive orders for other persons also. In this case the prisoner was bound to devote the whole of his time to the prosecutors.]

BOVILL, C.J.—The evidence in this case clearly showed that the prisoner was a clerk or servant within the statute. There is nothing in the evidence inconsistent with that relation. *Reg. v. Tite* conclusively shows that the prisoner was a clerk or servant. The conviction will be affirmed.

The rest of the Court concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 22, 1871.

(Before BOVILL, C.J., MARTIN, B., BRAMWELL, B., BYLES, J., and
BLACKBURN, J.)

REG. v. TOWNLEY.(a)

Larceny—Animals feræ naturæ.

Rabbits were netted, killed, and put in a place of deposit, viz., a ditch, on the land of the owner of the soil on which the rabbits were caught, and some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers who had previously found the rabbits and lay in wait for the poachers.

Held, that this did not amount to larceny.

CASE reserved for the opinion of this Court by Mr. Justice Blackburn.

The prisoner and one George Dunkley were indicted before me at the Northampton Spring Assizes for stealing 126 dead rabbits.

In one count they were laid as the property of William Hollis ; in another as being the property of the Queen.

There were also counts for receiving.

It was proved that Selsey Forest is the property of Her Majesty.

An agreement between Mr. Hollis and the Commissioners of the Woods and Forests on behalf of Her Majesty was given in evidence, which I thought amounted in legal effect merely to a licence to Mr. Hollis to kill and take away the game, and that the occupation of the soil and all rights incident thereto remained in the Queen. No point, however, was reserved as to the proof of the property as laid in the indictment.

The evidence showed that Mr. Hollis's keepers, about eight in the morning on the 23rd of September, discovered 126 dead and newly killed rabbits and about 400 yards of net concealed in a ditch, in the forest, behind a hedge, close to a road passing through the forest.

The rabbits were some in bags and some in bundles, strapped together by the legs, and had evidently been placed there as a place of deposit by those who had netted the rabbits.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The keepers lay in wait, and about a quarter to eleven on the same day Townley and a man, who escaped, came in a cab driven by Dunkley along the road. Townley and the man who escaped left the cab in charge of Dunkley, and came into the forest, and went straight to the ditch where the rabbits were concealed, and began to remove them.

The prisoners were not defended by counsel.

It was contended by the counsel for the prosecution that the rabbits on being killed and reduced into possession by a wrongdoer became the property of the owner of the soil, in this case the Queen (*Blades v. Higgs*, 7 L. T. N. S. 798, 834); and that even if it was not larceny to kill and carry away the game at once, it was so here, because the killing and carrying away was not one continued act.

1 Hale P. & C. 510, and *Lee v. Risdon* (7 Taunt. 191) were cited.

The jury, in answer to questions from me, found that the rabbits had been killed by poachers in Selsey Forest, on land in the same occupation and ownership as the spot where they were found hidden.

That Townley removed them, knowing that they had been so killed, but that it was not proved that Dunkley had any such knowledge.

I thereupon directed a verdict of not guilty to be entered as regarded Dunkley, and a verdict of guilty as to Townley, subject to a case for the Court of Criminal Appeal.

It is to be taken as a fact that the poachers had no intention to abandon the wrongful possession of the rabbits which they had acquired by taking them, but placed them in the ditch as a place of deposit till they could conveniently remove them.

The question for the Court is, whether on these facts the prisoner was properly convicted of larceny.

The prisoner was admitted to bail.

COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C.J.—[After stating the facts.] The first question that arises is as to the nature of the property. Live rabbits are animals *feræ naturæ*, and are not the subject of absolute property; though at the same time they are a particular species of property *ratione soli*—or rather the owner of the soil has the right of taking and killing them, and as soon as he has exercised that right they become the absolute property of the owner of the soil. That point was decided in *Blades v. Higgs* (*sup.*) as to rabbits; and in *Lonsdale v. Rigg* (26 L. J. 196, Ex.) as to grouse. In this case the rabbits having been killed on land the property of the Crown, and left dead on the same ground, would therefore in the ordinary course of things have become the property of the Crown. But before a person can be convicted of larceny of a thing not the subject of larceny in its original state, as, *e.g.*, of a thing attached

to the soil, there must not only be a severance of the thing from the soil, but a felonious taking of it also after such severance. Such is the doctrine as applied to stealing trees and fruit therefrom, lead from buildings, fixtures, and minerals. But if the act of taking is continuous with the act of severance, it is not larceny. The case of larceny of animals *feræ naturæ* stands on the same principle. Where game is killed and falls on another's land, it becomes the property of the owner of the land, but the mere fact that it has fallen on the land of another does not render a person taking it up guilty of larceny, for there must be a severance between the act of killing and the act of taking the game away. In the present case we must take it that the prisoner was one of the poachers, or connected with them. Under these circumstances, we might come to the conclusion that it was a continuous act, and that the poachers netted, killed, packed up, and attempted to carry away the rabbits in one continuous act, and therefore that the prisoner ought not to have been convicted of larceny.

MARTIN, B.—I am of the same opinion. It is clear that if a person kills rabbits, and at the same time carries them away, he is not guilty of larceny. Then, when he kills rabbits and goes and hides them, and comes back to carry them away, can it be said that is larceny? A passage from Hale's P. C. 510—"If a man comes to steal trees, or the lead off a church or house, and sever it, and after about an hour's time or so come and fetch it away, it is felony, because the act is not continued, but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was argued by the Court of King's Bench (9 Car. 1), upon an indictment for stealing the lead off Westminster Abbey"—was relied on by the prosecution. There is also a dictum of Gibbs, C.J., to the same effect in *Lee v. Risdon* (7 Taunt. 191). I am not insensible to the effect of those dicta; but here we must take it as a fact that the poachers had no intention to abandon possession of the rabbits, but put them in the ditch for convenience sake; and I concur in thinking that the true law is that, when the poachers go back for the purpose of taking them away, in continuation of the original intention, it does not amount to larceny.

BRAMWELL, B.—Our decision does not appear to me to be contrary to what Lord Hale and Gibbs, C.J., have said in the passages referred to. If a man, having killed rabbits on the land of another, gets rid of them because he is interrupted, and then goes away and afterwards comes back to remove the rabbits, that is a larceny; and so, if on being pursued he throws them away; and it is difficult to perceive any distinction where the owner of a chattel attached to the freehold finds it on his land severed, and the person who severed it having abandoned it afterwards comes and takes it away. It is in those cases so left as to be in the possession of the true owner, and the act is not, as Lord Hale expresses it, continued. In this case, however, the rabbits were left by the poachers as trespassers in a place of deposit,

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though it happened to be on the land of the owner; and it is just the same as if they had been taken and left at a public house, or upon the land of a neighbour. If they had been left on the land of a neighbour, or at a public house, could it have been said to be larceny? Clearly not; and if not, why is it larceny because the poachers left them in a place of deposit on the owner's own land? It seems to me that the case is not within the dicta of Lord Hale and Gibbs, C.J., but that here the act was continuous, and that there was an asportation by the poachers to a place of deposit, where they remained not in the owner's possession.

BYLES, J.—I cannot say that I have not entertained a doubt in this case; but upon the whole I think that this was not larceny. The wrongful taking of the rabbits was never abandoned by the poachers, for some of the rabbits were in their bags. It could hardly be said that if a poacher dropped a rabbit and afterwards picked it up that could be converted into larceny, yet that would follow if the conviction were upheld.

BLACKBURN, J.—I am of the same opinion. Larceny has always been defined as the taking and carrying away of the goods and chattels of another person; and it was very early settled where the thing taken was not a chattel, as where a tree was cut down and carried away, that was not larceny, because the tree was not taken as a chattel out of the owner's possession, and because the severance of the tree was accompanied by the taking of it away. The same law applied to fruit, fixtures, minerals, and the like things, and statutes have been passed to make stealing in such cases larceny. Though in the House of Lords, in *Blades v. Higgs*, it was decided that rabbits killed upon land became the property of the owner of the land, it was expressly said that it did not follow that every poacher is guilty of larceny, because, as Lord Cranworth said, "Wild animals, whilst living, though they are, according to Lord Holt, the property of the owner of the soil on which they are living, are not his personal chattels so as to be the subject of larceny. They partake, while living, of the quality of the soil, and are, like growing fruit, considered as part of the realty. If a man enters my orchard and fills a wheelbarrow with apples, which he has gathered from my trees, he is not guilty of larceny, though he has certainly possessed himself of my property; and the same principle is applicable to wild animals." The principle is as old as 11 Year Book (par. 33), where it is reported that a forester who had cut down and carried away trees could not be arraigned for larceny, though it was a breach of trust; but it was said it would have been a different thing if the lord of the forest had cut down the trees and the forester had carried them away, then that would have been larceny. So that, in the case of wild animals, if the act of killing and reducing the animals into possession is all one and continuous, the offence is not larceny. The jury have found in this case that the prisoner knew all about the killing of the rabbits, and that they were lying in the ditch. It is clear that, during the three hours they were lying there, no

one had any physical possession of them, and that they were still left on the owner's soil; but I do not see that that makes any difference. Then there is the statement from Hale's P. C. 510, where it is said that larceny cannot be committed of things that adhere to the freehold, as trees, or lead of a house, or the like, yet that the Court of King's Bench decided that, where a man severed lead from Westminster Abbey, and after about an hour's time came and fetched it away, it was felony, because the act is not continuous but interpolated; and Lord Hale refers to Dalton, c. 103, p. 166. And Gibbs, C.J., expressed the same view very clearly in *Lee v. Risdon*. Now, if that is to be understood as my brother Bramwell explained, I have no fault to find with it; but if it is to be said that the mere fact that the chattel having been left for a time on the land of the owner has thereby remained the owner's property, and that the person coming to take it away can be convicted of larceny, I cannot agree with it as at present advised. If we are to follow the view taken by my brother Bramwell of these authorities, they do not apply here, for no one could suppose that the poachers ever parted with the possession of the rabbits. I agree that, in point of principle, it cannot make any difference that the rabbits were left an hour or so in a place of deposit on the owner's land. The passage from Lord Hale may be understood in the way my brother Bramwell has interpreted it, and if so the facts do not bring this case within it.

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Conviction quashed

COURT OF CRIMINAL APPEAL.

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(Before BOVILL, C.J., MARTIN, B., BRAMWELL, B., BYLES, J., and
BLACKBURN, J.)

REG. v. JOHN CHILD. (a)

*Arson—Setting fire to goods in a house—House catching fire
therefrom—Malicious intent—24 & 25 Vict. c. 97, s. 7.*

*A person maliciously set fire to goods in a house with intent to injure
the owner of the goods, but he had no malicious intention to burn
the house or to injure the owner of it. The house did not take
fire, but would have done so if the fire had not been extinguished.
Held, that if the house had thereby caught fire, the setting fire to it
would not have been within sect. 7 of the 24 & 25 Vict. c. 97, as,
under the circumstances, it would not have amounted to felony.*

CASE reserved for the opinion of this Court by Mr. Justice
Blackburn.

The prisoner was tried before me at the Norfolk Spring
Circuit.

The indictment contained two counts; the first, "that the
prisoner unlawfully, maliciously, and feloniously did set fire to
divers goods and chattels, the property of Fanny Goldsmith then
and there being in a building, to wit, a dwelling-house, with
intent thereby to injure."

The second count alleged that it was "under such circum-
stances, that if the building had been thereby set fire to, the
offence would have amounted to felony."

The evidence was that the prisoner from ill will and malice
against the prosecutrix broke up her chairs, tables, and other
furniture, made a pile of them and her clothes on the stone floor
of the kitchen of her lodgings, and lit them at the four corners,
so as to make a bonfire of them. The building would almost
certainly have been burned in consequence, had not the police
who were sent for succeeded in extinguishing the bonfire which
the prisoner had kindled before the house was actually ignited.

The prisoner was not defended by counsel.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

The only enactment that was cited, or that I was aware of bearing on the case, was the 24 & 25 Vict. c. 97, s. 7.

I thought that the true construction of that enactment was not such as to make it felony maliciously to set fire to goods in a dwelling-house *per se*, and consequently that the first count, though it was proved, was not good in law; and on the second count I thought that if the dwelling house, in which the goods were, had caught fire from the burning goods, the question whether the offence would have amounted to felony depended upon a further question—viz., whether such a setting fire to the dwelling house would have been malicious, and with intent to injure, so as to bring the case within 24 & 25 Vict. c. 97, s. 3. As to this I explained to the jury that, though the prisoner's object was only to destroy the furniture and injure the owner of it, and not to destroy the house or injure the landlord; yet, if the jury thought that he was aware that what he was doing would probably set the building on fire, and so necessarily injure the owner, and was at best reckless whether it did so or not, they ought to find that if the building had caught fire from the setting fire to the goods, the offence would have been felony—otherwise not.

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The jury found that the prisoner was guilty, but not so that if the house had caught fire the setting fire to the house would have been wilful and malicious.

As it seemed to me apparent from the note in Mr. Greaves's Criminal Law Consolidation and Amendment Acts, p. 213, that the framers of the 24 & 25 Vict. c. 97, s. 7, meant to include all cases in which, if the fire had been set to the building with the same intent as it was set to the things in the building, the offence would have been felony, I reserved the case for the Court of Criminal Appeal.

The question for the Court is, whether on the evidence and finding of the jury the prisoner is properly convicted upon either count.

The prisoner, not having been able to obtain bail, remains in custody.

COLIN BLACKBURN.

No counsel appeared on either side.

The Judges retired to consider the case, and on their return into court the following judgments were delivered:—

BOVILL, C.J.—When the prisoner was convicted at the trial, a question was reserved by my brother Blackburn as to the effect of sect. 7 of 24 & 25 Vict. c. 97, which enacts that, "whosoever shall unlawfully and maliciously set fire to any matter or thing being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony." The prisoner had maliciously, and with intent to injure the owner of certain goods in a dwelling-house, set fire to them, and, although the house was not set on fire, it almost certainly would have been if the

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fire which the prisoner had kindled had not been discovered and extinguished. My brother Blackburn left it to the jury to say whether the prisoner had acted maliciously with respect to the house, and directed them that, though the prisoner's object was only to destroy the furniture and injure the owner of it, and not to destroy the house or injure the landlord, yet, if the prisoner knew that what he was doing would probably set the house on fire, and so injure the owner, and was reckless whether it did so or not, they ought to find that if the building had caught fire from the setting fire to the goods the offence would have been felony. In answer to this direction of the judge, the jury negatived any malicious intention in the sense explained to them by the learned judge, but found the prisoner guilty, adding that the prisoner did not intend to injure the owner of the house, nor maliciously intend to set fire to the house itself. Under these circumstances, the only fact that can be taken to have been found is that the prisoner maliciously set fire to goods in a dwelling-house with intent to injure the owner of the goods. There is no clause in the Act which makes the unlawfully and maliciously setting fire to goods in a dwelling-house a felony. An offence of that kind would come within sect. 51 of the Act. If we were to hold that this case came within sect. 7 we should be rejecting the words "under such circumstances that if the building were thereby set fire to, the offence would amount to felony." We have no authority to reject those words, for it is clear that it is meant that there must be such a setting fire to the house as would amount to felony within the meaning of some of the preceding sections. If any of those sections could apply to the present case it would be sect. 3, which declares it to be a felony "unlawfully and maliciously to set fire to any house, &c., with intent thereby to injure any person;" but the jury have negatived any malicious intention to injure the house or the owner of the house, and found that there was simply an intent to injure the goods. I am clearly of opinion that that is not a felony within sect. 3, and that the conviction must therefore be quashed.

MARTIN, B.—I am of the same opinion. I think that the first count is bad in law, and does not disclose any offence. As to the second count, the jury have negatived an essential element—malicious intention towards the house or its owner.

BRAMWELL, B.—I think that, even if the house had been in fact set fire to, the prisoner would be entitled to an acquittal upon this finding, for I interpret it to express an opinion not only that the prisoner did not intend to burn the house, but that the prisoner thought that the house would not catch fire.

BYLES, J.—I also think that, according to the finding of the jury, the prisoner neither acted maliciously nor recklessly as regards setting fire to the house or injuring the owner of it.

BLACKBURN, J.—I am of the same opinion. At the trial I thought that the conviction could not be supported. It seemed to me quite clear that the framer of the statute meant to include

a case of this kind, and it is unfortunate that the words which have been used do not carry out that intention. The terms of the former statute (14 & 15 Vict. c. 19, s. 8), "if any person shall wilfully and maliciously set fire to any goods or chattels being in any building, the setting fire to which is made felony by this or any other Act of Parliament, he shall be guilty of felony," would clearly have included this case, for the prisoner did maliciously set fire to goods in a building the burning of which would have been felony. It happens unfortunately that the 24 & 25 Vict. c. 95, repealed that enactment, and 24 & 25 Vict. c. 97, s. 7, has the words, "under such circumstances that if the building were thereby set fire to, the offence would amount to felony," in lieu of "the setting fire to which would amount to felony." Mr Greaves in his Criminal Law Consolidation Acts adds a note to this section, to the effect that these words were advisedly substituted, in consequence of *Reg. v. Lyons* (1 Bell C.C. 28; 8 Cox C.C. 84), and in order to include cases where an intent to injure was necessary as well as those where it was not; and he further states that the committee of the House of Lords thought they would include every case which could arise. The object was plainly to include cases like this; but I cannot agree with his reasoning in 1 Russ. on Crimes, 742 (note), that if the setting fire to the one is malicious, the setting fire to the other would be malicious also. I think, and so directed the jury, that to make the act malicious with respect to the owner of the house, the burning of the house must not only be the natural result of the setting fire to the goods, but the prisoner must at least be reckless whether he thereby set the house on fire or not. Finding that this view was opposed to what was the intention of the Legislature as stated by Mr. Greaves, I reserved the case, but I am of opinion that the words used in sect. 7 have restricted, instead of extending, the liability which existed under 14 & 15 Vict. c. 19, s. 8.

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Conviction quashed.

COURT OF CRIMINAL APPEAL.

*April 22, 1871.**(Before BOVILL, C.J., MARTIN, B., BRAMWELL, B., BYLES, J., and BLACKBURN, J.)**REG. v. WILLOT.(a)**False pretences—Remoteness of the pretence—Evidence.**An indictment for false pretences charged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags.**The evidence was that defendant saw prosecutor and gave him his card, "J. W. and Co., timber and coal merchants," &c., and said that he was largely in the coal and timber way, and inspected some coal bags, but objected to the price. The next day he called again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. Prosecutor had only forty bags ready, and it was arranged that defendant was to have them, and pay for them in a week. They were delivered to defendant, and prosecutor said he let the defendant have the bags in consequence of his having the trucks of coals under demurrage at the station.**There was evidence as to the defendant having taken premises, and doing a small business in coal, but he had no trucks of coal on demurrage at the station.**The jury convicted the prisoner, and on questions reserved this Court held that the false pretence charged was not too remote to support the indictment, and that the evidence was sufficient to sustain it.**CASE reserved for the opinion of this Court at the General Sessions of the peace, held at Exeter, in and for the county of Devon, on Tuesday, the 14th of February, 1871.**John Willot was tried at the sessions above set forth.**The material part of the indictment against him charged, "That he, on the 20th of December, 1870, contriving and intending to cheat and defraud, did unlawfully, knowingly, and designedly, falsely pretend to one Joshua Caryl Clogg, that he, the said John Willot, was a timber and coal merchant, dealer in seeds, guano,**(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.*

and other manures, farm implements, &c., at 3, Bartholomew-street, Exeter, and that his yard and stores were in the Commercial-road, meaning in the city of Exeter. And the jurors aforesaid, upon their oath aforesaid, further present, that on the 21st of December, in the year aforesaid, the said John Willot did unlawfully, knowingly, and designedly, falsely pretend to the said Joshua Caryl Clogg that he, the said John Willot, had a lot of trucks of coal at Queen-street Station, meaning thereby the Exeter Station of the London and South-Western Railway, and that the said trucks were under demurrage, and that he, the said John Willot, required forty coal bags."

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The indictment then negatived the alleged false pretences in the usual way.

It appeared from the evidence of the prosecutor, Joshua Caryl Clogg, that he is a bag maker, in business at St. Thomas, in the county of Devon.

On the 20th of December, 1870, the prisoner called at prosecutor's shop and gave him a card, on which was printed, "J. Willot and Co., timber and coal merchants, dealers in seeds, guano and other manures, farm implements, &c., 3, Bartholomew-street, Exeter. Yards and stores, Commercial-road." He said, "That he was on largely in the coal and timber way," and asked to see some bags. Prosecutor showed prisoner some bags, but prisoner objected to the price and went away, saying that he would call again. The next day (the 21st of December) prisoner came to the prosecutor again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the Queen-street Station under demurrage, and that he wanted some bags immediately. He also asked prosecutor to recommend him a carter. Prosecutor recommended a Mr. Newcombe. Prisoner then left, saying he would go to Newcombe, and returned soon afterwards, saying that he made an arrangement with Newcombe, and wanted eighty bags. Prosecutor had only forty bags ready. It was then arranged between the prisoner and the prosecutor that the prisoner should have forty bags, and that he should pay for them in a week. The prisoner then left. On Friday, the 23rd of December, the younger Newcombe called, and the prosecutor delivered the forty bags to him. The prosecutor stated that he let the prisoner have the bags in consequence of his having the trucks under demurrage at the Queen-street Station.

On cross-examination the prosecutor said that the prisoner took away the bags three days after he bought them. He also said that he had seen prisoner's advertisements in the newspapers, and that he had also seen a lease of premises in the Commercial-road from the town council of Exeter to the prisoner, and that before prisoner's arrest he went to the place, and found that the premises were being repaired for the prisoner by the town council; but he could not say what was the extent of prisoner's trade, or whether he had any business at all. The prosecutor swore that the prisoner's card and his statement that he had premises in the

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Commercial-road, and that he was in trade there, had no effect whatever upon his (prosecutor's) mind, and that he parted with his goods solely on the faith of prisoner's statement that he had coals under demurrage. The prosecutor said that he knew that after the bags were delivered prisoner twice called at his shop while he was absent, and saw his (prosecutor's) son about payment, and that he himself also called once at prisoner's house, and found that prisoner was out. Twenty of the bags would hold a ton of coals. Prosecutor further said in cross-examination that he never sent in any bill to the prisoner up to the time of his arrest, which took place at Bartholomew-square, Exeter, on the 9th of January, 1871, under a warrant.

Newcombe proved that prisoner came to his house on the 21st of December, and stated to him also that he had five or six trucks of coal under demurrage at Queen-street Station, and arranged with him to send five or six carts on the following Friday (the 23rd of December) to remove it.

On the next day (the 22nd of December) prisoner came to Newcombe, and said that he should only want one cart and horse. On Friday, the 23rd of December, Newcombe's son, the younger Newcombe, accordingly met prisoner with a cart and horse. The prisoner then sent the younger Newcombe to the prosecutor's for the bags, and as soon as he returned with them prisoner told him to go to Queen-street Station, but afterwards countermanded this, saying, "We will go to St. David's first."

Accordingly prisoner and the younger Newcombe went first to the St. David's railway station. The St. David's Station belongs to the Bristol and Exeter Railway Company. The Queen-street Station belongs to the South-Western Railway Company.

At the St. David's Station the younger Newcombe by prisoner's order loaded two tons of coal from the Patent Fuel Company's stores, and delivered it at various houses in Exeter, under the direction of a man named Eden, whom prisoner sent with him. The prisoner then took the younger Newcombe, with the cart, to the Queen-street Railway Station. There, by prisoner's directions, a ton of coal was loaded from a truck into bags, which the prisoner had obtained from prosecutor, and was carted to the prisoner's premises in the Commercial-road, where it and the bags were left.

Durston proved that the two loads of coal carted by the younger Newcombe from the St. David's Station were sold by him to the prisoner on the 22nd of December. The prisoner told him that he had the bags from Mr. Clogg, and had paid 8*l.* for them, and had been allowed 10*s.* discount.

In cross-examination this witness said that he had a partner named Broomfield, and that he knew that Broomfield had sold prisoner some coal about that time.

A coal merchant named David Perry, whose firm had trucks of coal at the Queen-street Station, said that prisoner called upon him and wanted to buy some coal on and previously to the 22nd

of December, and that on the 22nd of December he sold prisoner two tons of coal; consequently, on the 23rd of December he allowed the ton carted away by the younger Newcombe to be taken. He also knew that prisoner had been corresponding with the Bristol and Exeter Railway about a special rate for the carriage of coals, and had seen a letter from the Company to the prisoner on the subject. He also knew that the town council of Exeter had let premises in the Commercial-road, Exeter, to the prisoner.

Eden, the man who accompanied the younger Newcombe when he delivered the coal taken from the St. David's Station, proved that it was delivered at houses where orders had been previously obtained for it by him on prisoner's behalf, and that when later in the day, on the 22nd of December, he came to the Queen-street Station, prisoner asked whether he had any more orders, he said, "No;" and prisoner then pointed to the truck from which a load was subsequently taken, and said, "That's my truck; I will have twenty bags out of it and take them to my stores."

In cross-examination Eden said prisoner had not been paid for the coal delivered at houses in Exeter on the 23rd of December. Coals were hard to get just at that time; and several ships had been prevented from coming up the River Exe by the ice.

A warehouseman from the Queen-street Station said that there never was any coal at that station consigned to "J. Willot," or "J. Willot and Co.," and that there were no coals at the station under demurrage on the 23rd of December.

The manager of the coal department of the Bristol and Exeter Railway gave similar evidence, except that he could not say whether or not there was coal at St. David's station under demurrage.

In cross-examination both these witnesses said that they should know nothing about goods till they actually arrived.

At the close of the case for the prosecution the prisoner's counsel objected—first, that under the circumstances of the case the statement by prisoner that he had coals at the Queen-street Station under demurrage was too remote to support an indictment; and, secondly, that such statement had not been proved to be untrue.

The Court overruled both objections.

No witnesses were called for the defence.

In summing up, the Chairman told the jury that the only false pretence on which they could convict was prisoner's statement that he had coals at the Queen-street Station under demurrage; and that in order to convict, they must be satisfied that the prosecutor, on the faith of that representation, parted with his bags, and also be satisfied that the statement was false, and that the goods were obtained with intent to defraud.

The jury found the prisoner guilty, but recommended him to mercy. The prisoner was then sentenced to six months' imprisonment with hard labour; but the Court reserved the

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questions raised by the counsel. The prisoner remains in custody.

The questions for the consideration of the Court are : First, whether, under the circumstances of the case, prisoner's statement that he had coal at the Queen-street Station under demurrage is, or is not, too remote to support an indictment ; and secondly, whether there was sufficient evidence of its being false to go to the jury.

If the Court shall be of opinion that the false pretence in question was not too remote, and that there was sufficient evidence of its being false to go to the jury, then the conviction will be confirmed. But if the Court shall be of opinion either that the false pretence relied on was too remote to support an indictment, or that there was not sufficient evidence of its being false to go to the jury, then the conviction will be quashed. -

MORLEY, Chairman.

G. Lewis, for the prisoner.—The conviction was wrong. Here the false pretence that the prisoner had coals at the Queen-street Station under demurrage was not sufficiently connected with the obtaining of the coal bags from the prosecutor to support the conviction. It amounted to no more than this, that the prisoner represented himself to be, as he was in fact, a coal merchant, and that he required the coal bags in the way of his business. The mere fact of not having coals on demurrage at the station was not sufficient to found the charge of false pretences, for he had coals there, as was proved. [BLACKBURN, J.—In *Rex v. Villeneuve* (2 East P. C. 830), where the defendant falsely pretended to J. N. that he was entrusted by the Duke de Lauzan to take some horses from Ireland to London for him, that he had been detained by contrary winds, and had spent all his money, and thereby induced J. N. to advance him money ; that was holden to be a false pretence within the Act. Why is not the present case within the Act ?] No credit was given on account of this statement about the coal on demurrage. [BRAMWELL, B.—Is that so ? Does not the representation amount to this : “I am a person of such credit that persons send me trucks of coal ?”] In *Rex v. Johnson* (2 Moo. C. C. 254), it was held, where money was obtained by falsely pretending that the defendant intended to marry A. and wanted money for the wedding suit, that the case was not within the Act. [MARTIN, B.—The jury have found that the bags were obtained by the fraudulent representation that the prisoner had coals on demurrage at the station, and that the prisoner did not mean to pay for the bags. The only question is, whether there was evidence for the jury.] The false representation was too remote. Where defendant represented himself to be a naval officer, and thereby induced the prosecutrix to contract to board and lodge him at a guinea per week, and so obtained various articles of food, it was held that the obtaining of the food was too remotely the result of the false pretence, and

that a conviction could not be supported : (*Reg. v. Gardner*, Dears. & B. 40 ; 7 Cox C. C. 136. See also *Reg. v. Bryan*, 2 Fos. & Fin. 567.) As to the second point, that there was no evidence to go to the jury, it is quite consistent with all the facts of the case that the bags were not obtained by means of this false representation : (*Reg. v. Stone*, 1 Fos. & Fin. 311.)

H. Olark, for the prosecution, was not called upon to argue.
By the COURT.—The conviction must be affirmed.

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Conviction affirmed.

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April 22, 1871.

(Before BOVILL, C.J., MARTIN, B., BRAMWELL, B., BYLES, J., and BLACKBURN, J.)

REG. v. KING. (a)

Embezzlement—Receipt of the money.

A conductor of a tramway car was charged with embezzling 3s. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand in all the money received during each day on the following morning. The prisoner's money should have been 3l. 1s. 9d. according to his way bills for the day, but he paid in only 3l. 0s. 8d. :

Held, that there was sufficient evidence of the receipt of 7s. 11d. the total amount of fares of the particular journey, and of the embezzlement of 3s. part thereof.

CASE reserved for the opinion of this Court from the Surrey Sessions.

At the General Quarter Sessions of the peace, holden by adjournment at St. Mary, Newington, in and for the county of Surrey, on Monday, the 6th of March, 1871, Thomas King

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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was tried and convicted upon an indictment charging him with feloniously and fraudulently embezzling on the 10th of February, 1871, 3s. of the moneys of the London Tramways Company (Limited), his masters.

At the trial the following evidence was given :—

George Mellish, P.C. 50 W., said: On Friday, the 10th of February, I made a journey in car 10, of which prisoner was the conductor, at 5.40. Robinson and I sat in different parts of the car. I am acquainted with the distances for which the fares are 2d. and 3d. Fifteen who got out were 3d. fares. Each paid money. Prisoner gave each a ticket. Twenty-five were 2d. I did not see each pay, nor see prisoner give to each a ticket. For a 3d. fare I put a bean in my left pocket, and for a 2d. fare I put a bean in my right. The number of beans in my pockets and in those of Robinson's corresponded. I saw prisoner make out a way bill at the end of the journey, at Brixton church. There is an interval of five or ten minutes before they start again. The car holds twenty-two.

Cross-examined: The fifteen got in at starting at Westminster-bridge. They got out after they had passed Kennington. Prisoner received two fares, and gave no tickets. Two 2d. fares. We saw money pass.

By Jury: Both tickets were blue. 3d. were blue, and 2d. a shade lighter.

John Robinson, 252 W.: I travelled by the same car. I know the 2d. and 3d. distances. Between Westminster and Kennington there were eight outside and seven inside. Fifteen at 2d. each. They got down before they came to Kennington church. I saw them all pay, but I do not know how much. All received tickets except two ladies, and no tickets were offered to them. Ten got in at Kennington church and rode to Brixton church; all 2d. fares, making twenty-five 2d. fares. These ten all paid, and had tickets. There were fifteen 3d. fares, and they all paid, and had tickets. Some of the tickets were thrown on the floor of the car. I saw King make out his way bill; he had plenty of time to do it. I took prisoner into custody on Monday, the 13th of February, and charged him with embezzling 3s., and told him it would be explained to him at the station. He made no answer. I searched him, and found eight old 1d. workmen's tickets. No counterfoils were found upon him. I asked him what he had the tickets in his possession for, and he said, "It is very probable I might have more, for I often put them in my pocket." I compared the beans in my pockets with the other police constable, and they corresponded.

John Bemister, clerk to the Metropolitan Tramways Company, said: Conductors have to send their way bills to me. This way bill, dated the 10th of February, is signed by the prisoner for the 5.40 journey. It is the duty of conductors to give tickets to each passenger. The items are nine 3d. tickets and sixteen 2d. tickets. The way bill does not state the time of the journey, but states

eighth journey, 10th car, and it would be about the time. On the following morning he should pay in a bag the money he received. I make out a statement and send the way bills and bags to the chief office. No one can tamper with them. The whole amount paid for this day would be 3*l.* 1*s.*, and for this one journey from Westminster to Brixton on this occasion was 4*s.* 11*d.* Prisoner had no business to have these old workmen's tickets in his possession.

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Cross-examined: Mistakes have been made in numbering the tickets consecutively. The practice now is to count the money brought in by the conductors; this plan was commenced about fortnight since. The conductors have to find their own change.

William Meloy, traffic manager to the Metropolitan Tramways Company, said: Prisoner was a conductor at 28*s.* and a bonus of 2*s.* 6*d.* per week. On Monday, the 13th of February, I gave prisoner into custody at the thirteenth journey. The car No. 10, on the eighth journey, leaves Westminster-bridge about five, or sometimes after five.

Thomas Henry Cox, clerk to the Tramways Company at their office in Parliament-street, said: The bags and sheets are sent to me. On the 11th of February I received returns of King, the prisoner. The account was for 3*l.* 1*s.* 9*d.*, but the money in the bag was 3*l.* 0*s.* 8*d.* This deficiency would be deducted from his wages. Turner brings money and bags.

Charles Turner said: I fetched the bags from Bemister on the morning of the 11th of February. I took them as they were given to me to Mr. Cox.

The prisoner's statement before the police magistrate was read, which was as follows: At 5.40 there is generally a great number of passengers, and I begin to take their fares and give them tickets when the car is nearly full, which is generally after we pass the Hercules, and if two or three get in after that I take their fares and give them tickets as they come out, and each passenger had a ticket. The constable has made an error in saying I said it was a usual thing for me to carry tickets. I said nothing of the kind. I had a few old penny tickets in my pocket rolled up, but I never used any, and those are the only tickets found on me. The constable never told me I was charged with embezzling 3*s.*; he never mentioned the amount. They could not tell whether they were 2*d.* or 3*d.* tickets that I delivered.

At the conclusion of the above-mentioned evidence the prisoner's counsel submitted that there was not sufficient evidence to go to the jury.

The Court, however, left the case to the jury, who returned a verdict of guilty, and the Court thereupon reserved the following points for the decision of the Court for Crown Cases Reserved:—

First, was it necessary to prove the actual payment to the prisoner of the money charged as being embezzled, or were the jury at liberty to infer such payment from the whole of the circumstances proved in evidence.

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Secondly, was there any evidence to show that the prisoner received more money than he accounted for, or sufficient evidence to go to the jury on the whole case.

The Court respited judgment, and admitted the prisoner to bail until the decision of the Court for Crown Cases Reserved shall be known.

E. RICHARD ADAMS, Chairman.

Oppenheim for the prisoner.—The conviction was wrong, for the evidence was insufficient. It was necessary to prove that the prisoner actually received 7s. 11d., the aggregate amount of fifteen 3d. fares and twenty-five 2d. fares. The witnesses cannot say what sum each or any of the passengers paid, only that each paid money. It is not to be inferred that each paid the right fare simply because they ought to have done so. [BLACKBURN, J.—It is not an unreasonable inference that each passenger paid the right fare, and that the prisoner received it.] There cannot be embezzlement until it is proved that the money alleged to be embezzled has been actually received. [BYLES, J.—There was evidence of the receipt, for that would be the reasonable and probable result from what was seen by the witnesses. BOVILL, C.J.—The prisoner's own statement that each passenger had a ticket is as good evidence that he received all the fares as well could be.] In *Rex v. Chapman* (1 Car. & K. 119), where it was the duty of a clerk to receive money, pay wages out of it, and make entries of all moneys received and paid in a book, and enter the weekly totals of receipts and payments in another book, upon which last book he paid over his balances, the clerk having entered weekly payments in the first book 25l., he entered them in the second book as 35l., and two months after, in accounting with his employer, made his balance 10l. too little, and paid it over accordingly, it was held that he could not be convicted of embezzlement without proof that he had received some particular sum and had converted the whole or part of that sum to his own use. Secondly, there was no evidence to show that the prisoner received more money than he accounted for. The evidence was that the prisoner made out a way bill for each journey, and on the following morning he paid in a bag the money he received—a lump sum of 3l. 0s. 8d.—to a clerk, who sent it and the way bills over, with a statement, to the chief office. There was only one way bill put in evidence relating to the journey in respect of which the money was alleged to have been embezzled. The other way bills for that day should have been produced: (*Rex v. Jones*, Car. & P. 834.)

BOVILL, C.J.—I think there was sufficient evidence on both points. It was the prisoner's duty to receive the fares when he issued the tickets, and the evidence was that fifteen of the passengers were 3d. fares, and twenty-five 2d. fares, and that each paid money to the prisoner, and the prisoner gave to each a ticket. The amount of these fares would be 7s. 11d., and it was the prisoner's duty to have received that money. The witnesses

saw them all pay money to the prisoner. The evidence is almost conclusive that the prisoner received 7s. 11d. Then did he embezzle any part of that sum? He did; for he made out a false account of the number of passengers, and paid over only 4s. 11d. The conviction will therefore be affirmed.

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MARTIN, B.—There was clear evidence on both points. It was not absolutely conclusive—it was circumstantial evidence; and I should have drawn the same conclusion as the jury, that the prisoner received 7s. 11d. and paid over only 4s. 11d., and embezzled the remainder.

The other Judges concurred.

Conviction affirmed.

See *Reg. v. Balls*, post, p. 87.

COURT OF CRIMINAL APPEAL.

April 29, 1871.

(Before BOVILL, C.J., MARTIN, B., BRAMWELL, B., BYLES, J., and BLACKBURN, J.)

REG. v. FLETCHER. (a)

Perjury—Affiliation summons—Jurisdiction to hear—7 & 8 Vict. c. 101—8 & 9 Vict. c. 10.

The 7 & 8 Vict. c. 101, s. 2, in the case of an application by a woman before the birth of a bastard child against the putative father for a maintenance summons requires that “the woman shall make a deposition upon oath, stating who is the father of the child.” A summons having issued in such a case, the defendant appeared thereto, made no objection to the summons, and was examined, and committed perjury :

Held, that the magistrate had jurisdiction to hear the summons, the defendant by appearing having waived any objection thereto on the ground that there was no written deposition of the woman made upon the application for the summons.

CASE reserved for the opinion of this Court by Cleasby, B.

The prisoner was tried before me at the Spring Assizes for the county of Derby, for perjury alleged to have been committed by him at the hearing of an affiliation summons.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The following is a copy of the summons :

Derbyshire, } To Thomas Fletcher, of Heanor, in the county of
to wit. } Derby. Whereas application hath this day
been made to me, the undersigned, one of Her Majesty's justices
of the peace for the county of Derby, by Jane Bestwick, single
woman, residing at Heanor, in the petty sessional division of the
said county for which I act, now with child, of which child she
hath this day duly sworn on oath before me, the said justice, that
you are the father, for a summons to be served on you to appear
at a petty sessions of the peace, according to the form of the
statute in such case made and provided.

These are therefore to require you to appear at the petty
sessions of the justices, holden at the Justice-room in Heanor in
the said county, being the petty session for the division in which
I usually act, on Monday, the 1st of August, 1870, at 11 o'clock
in the forenoon, to answer any complaint which she shall then
and there make against you touching the premises. Herein fail
you not.

Given under my hand, at Heanor, in the said county of Derby,
this 25th of April, 1870. M. MUNDY.

NOTE.—If you neglect to appear at the petty sessions, as above
stated, the justices, upon proof that this summons has been duly
served upon you, or left at your last place of abode, may proceed,
if they think fit, at the petty sessions therein named, to make an
order upon you, as the putative father of the child above referred
to, to pay a weekly sum to the said mother for its maintenance,
and other sums for costs and expenses.

The application for the summons was made before the birth of
the child, and the magistrate's clerk, who was called as a witness
before me, stated that no written deposition was made upon the
application. He also stated that when the application was made
the complainant was sworn, and verbally made a statement to the
effect stated in the summons.

The counsel for the prisoner referred to the statutes 7 & 8 Vict.
c. 101, and 8 Vict. c. 9, and contended that it was essential that
there should be a deposition in writing upon oath to give the
magistrate jurisdiction to hear the case.

I reserved the point for the consideration of this Court, and
took the opinion of the jury whether the prisoner had knowingly
stated before the magistrate what was untrue. The jury found
him guilty, and I let him out on bail to appear if called upon to
receive sentence at the next assizes.

The question for the opinion of the Court is, whether it is
essential, to give the magistrate jurisdiction to hear the application
summons, that there should have been a written deposition upon
oath by the complainant when the application for the summons
was made.

A. CLEASBY.

S. B. Bristowe, for the prisoner.—The conviction was wrong,

for the magistrate had no jurisdiction to issue the summons upon the verbal statement of the mother. The statutes require that she should make a deposition on oath, stating who is the father of the child. The 7 & 8 Vict. c. 101, s. 2, enacts that any single woman who may be with child may, before the birth of such child, make application to a justice of the peace for a summons to be served on the putative father; and when, as in the present case, the application is made before the birth of the child, the woman is to make "a deposition on oath," stating who is the father of such child, and the justice is thereupon to issue his summons to the person alleged to be the father of the child to appear at, &c. And by sect. 3, on the appearance of the person so summoned, the justices are to hear the evidence, and may adjudge the man to be the father. Then the 8 & 9 Vict. c. 10, s. 4, provides that justices in petty sessions may make an order "in respect of any such application" within two calendar months from the birth of the child. The word "deposition" is defined in Bouvier's American Law Dictionary to mean the statement of a witness reduced into writing in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provisions of some statute law, to be used on the trial of a question of fact in a court of justice. In Webster's Dictionary it is defined (1) the act of giving testimony on oath; (2) the attested written testimony of a witness—an affidavit. [BRAMWELL, B.—In indictments for perjury, whether verbal or written, it is usual to allege that the defendant did say, depose, swear, and give evidence; and, by the 14 & 15 Vict. c. 100, s. 20, it is enacted that it shall be sufficient in indictments for perjury to state "before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken." The statute seems to class depositions among written documents.] The 8 & 9 Vict. c. 10, which is to be read together with the 7 & 8 Vict. c. 101, gives a form of application by a woman before the birth of the child, which concludes, "Exhibited and sworn before me the day and year first above written." [BOVILL, C.J.—In Richardson's Dictionary "depose" is said to mean "to give evidence or bear testimony."] There is a difference in the proceedings in the cases of applications before and after the birth of the child. Where the application is after the birth the form commences, "The information and application of," whereas in the case of an application before birth, it is "Application and deposition of." [BLACKBURN, J.—It would seem that a deposition is a record of what is said on oath before the magistrate. The statutory form is a direction to the magistrate to make a record of the deposition of the applicant, but it is not a condition precedent to his jurisdiction to issue the summons that this should be done. I do not think that neglect by the magistrate to do that would make an order founded on a summons so issued not enforceable, and *à fortiori* would not prevent a person from being indicted for perjury committed upon the hearing of the summons. BRAMWELL, B.—

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Was the magistrate acting without jurisdiction in hearing the summons for not having taken down the woman's evidence in writing?] In *Reg. v. Berry* (8 Cox C. C. 121; Bell's C. C. 46) and *Reg. v. Shaw* (L. & C. 579; 10 Cox C. C. 66) the objection was the non-production of the summons, which was held to be cured by the appearance of the man at the hearing of the summons; but here the doctrine of waiver cannot apply, for the statute requires the deposition on which the summons is to issue to be in writing. The following cases were then referred to: *Reg. v. Simmons* (8 Cox C. C. 190); *Reg. v. Smith* (11 Cox C. C. 10); *Reg. v. Pearce* (9 Cox C. C. 258); *Reg. v. Hughes* (7 Cox C. C. 286; D. & B. 188); *Reg. v. Millard* (6 Cox C. C. 150).

BOVILL, C.J.—Mr. Bristowe has argued this case extremely well, and urged everything that could be said in favour of the objection. The jurisdiction of the magistrates in this case to hear the summons, and which they exercised when the false oath was taken, depends upon the 7 & 8 Vict. c. 101, s. 3, which enacts that after the birth of the child, on the appearance of the person summoned, or on proof that the summons was duly served, &c., the justices in petty sessions shall hear the evidence of the woman, and shall also hear any evidence tendered by the person alleged to be the father. A hearing of the summons did take place, and on that hearing the defendant was examined, and gave false evidence, for which he was afterwards indicted and convicted of perjury. On the trial of the indictment it was objected that the defendant was not regularly summoned before the magistrate, because the woman had not made a deposition on oath before the summons was issued. There was, in fact, a summons, and the defendant appeared to it. Mr. Bristowe contended that the statute meant that the woman should make a deposition in writing before the summons was issued. The statute does not say that the deposition is to be in writing, and I should have thought it meant an ordinary deposition. Ordinarily a deposition in proceedings before magistrates is understood to imply that the maker of it shall be sworn and examined, and his testimony taken down by the magistrates' clerk, and usually signed by the deponent. But so far as depositions before magistrates in indictable cases are concerned, they are taken down and signed under the 11 & 12 Vict. c. 42, s. 17, and they may be used in evidence in certain cases when the witnesses may become unable to attend at the trial. But that statute does not apply to cases like the present. No doubt the 8 & 9 Vict. c. 10, enacts that if the proceedings are in the form of or to the like tenor and effect as the forms in the schedule to that Act, they shall be taken to be valid and sufficient; but the statute does not require them to be in such form. And the section applies as well to proceedings taken before that Act as to future proceedings. Now, in this case it seems to me to be immaterial to determine whether the statute requires the deposition to be in writing or not, for if the woman is simply to depose orally,

and the magistrate is to make some record of her evidence, there is in this case a written statement in the summons that the woman was with child, and had sworn that the defendant was the father, and had applied for a summons against him. That is a document to the like tenor and effect as those in the schedule. Even if there had been no record at all of the deposition of the woman on the application for the summons, it is impossible to distinguish this case from *Reg. v. Berry* (6 Cox C. C. 121). That decision is the more important, because it was upon this very statute. The application in that case was more than twelve months after the birth of the child; and before the summons was issued there was no evidence on oath, as required by 7 & 8 Vict. c. 101, s. 2, that the putative father had paid money for the maintenance of the child within twelve months next after its birth. The objection was that the magistrates had no jurisdiction to hear the summons upon the hearing of which the perjury had been committed. This case and that seem to me to be identical. In that case the question was whether the proof on oath of the payment of money by the putative father, and in this whether a deposition in writing, were conditions precedent to the issuing of the summons. The Court held that the defendant's appearance to the summons was conclusive, he having made no objection to the summons on the hearing but denying the paternity only. Lord Campbell, C.J., said: "The proceeding against the putative father of a bastard child to obtain an order of maintenance is not a proceeding *in pœnam* to punish for a crime, but merely to enforce a pecuniary obligation, and is a suit within the meaning of the 14 & 15 Vict. c. 99, ss. 2 and 3, for which reason the defendant was admitted as a witness on his own behalf. Then, what is the summons which we have to consider? The process to bring the defendant into court in a civil suit. I incline to think that, according to strict regularity, before the summons issued there ought to have been evidence on oath of the payment of the money, although it is not expressly required by the statute to be on oath, as in the case where the complaint is made before the birth of the child." Here there was a summons which stated that evidence had been given that the woman was with child, and that defendant was the putative father, as required by the statute; and even if it had not been so stated, yet, the defendant having appeared, the magistrate had jurisdiction to hear the summons. The case is not distinguishable from *Reg. v. Berry*, and the conviction must be affirmed.

MARTIN, B.—I am of the same opinion. I agree that the word "deposition" in sect. 2 means something in writing. The definition of the word in Webster's Dictionary gives the ordinary understanding of it. The two Acts (7 & 8 Vict. c. 101, and 8 & 9 Vict. c. 10) are to be read together, and so reading them they satisfy me that that is the meaning of it. The 7 & 8 Vict. c. 101, s. 2, contains a positive enactment that, if the application be made before the birth of the child, the woman shall make a deposition on oath stating who is the father of the child. And it

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seems to me, from the 8 & 9 Vict. c. 10, s. 1, that it is to be a statement on oath taken down in writing; and although the woman refused to sign it, yet, if the magistrate signed it, that will be a deposition within the meaning of this enactment. I think, therefore, the proceeding was irregular, and that a written statement of what was deposed to by the woman on oath ought to have been drawn up to the like effect of the form in the schedule to the 8 & 9 Vict. c. 10. The defendant, however, appeared to the summons and made no objection to the irregularity. It was competent to the defendant to waive the objection, and he did so, and upon such waiver the magistrates had lawful authority to hear and decide upon the summons. They were then acting judicially, sufficiently so to make a man guilty of perjury who wilfully swore falsely upon a matter material to the issue then before them.

BRAMWELL, B.—I am of the same opinion.

BYLES, J.—I am of the same opinion. I think that all the matters necessary to give the justices jurisdiction concur in this case. The parties were present at the hearing of the summons within the magistrates' jurisdiction. There had been an application for the summons; the summons had been issued; the defendant appeared to it, and committed wilfully false perjury at the hearing of it. I agree that the word "deposition" means a statement of evidence reduced into writing in the ordinary form. But 7 & 8 Vict. c. 101, s. 3, varies this in the case where the appearance is after the birth of the child, and directs the justices merely to hear the evidence. To take the deposition of the woman, as required by sect. 2, and to hear the evidence, as directed by sect. 3, are in my opinion two distinct things. The summons, however, is only necessary to bring the putative father into court; and when he is in court the justices have jurisdiction to hear and decide the case, and any irregularity in the issuing of such summons is cured by the appearance.

BLACKBURN, J.—I am of the same opinion. On the construction of the 7 & 8 Vict. c. 101, s. 2, I think that the meaning of the words, "shall make a deposition on oath" is that the evidence shall be taken on oath, and taken down in writing under the sanction of the magistrate. But whether such deposition is to be signed by the witness, and afterwards signed by the magistrate, is a matter which we need not now consider. I doubt whether the statute is anything more than directory as to the matters required by sect. 2, for there are no words to oust the justices of all jurisdiction in case the requisitions are not complied with. The magistrate would be justified in refusing to issue a summons, if the directions of the statute are not followed, but an order made on a summons after appearance would be good, notwithstanding such irregularity. The case of *Reg. v. Berry*, which is undistinguishable, concludes this case, for it was there held that all irregularities in the issuing of the summons are cured by waiver. When a special jurisdiction is conferred by statute *pro hac vice*,

proof must be given that it has been properly exercised in every particular; but, where the jurisdiction created is large, and the Court has a general jurisdiction over many things, though its decision may be quashed in a particular matter, yet the jurisdiction to hear the matter remains. Take, for example, the case of an indictment tried in one county and the offence committed in another county, and the conviction therefore quashed for error in fact, yet I should be very sorry to say that perjury could not be assigned upon wilfully false evidence given on the trial.

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Conviction affirmed.

Attorney for the defendant, *S. Leech*, Derby.

COURT OF CRIMINAL APPEAL.

May 6, 1871.

(Before BOVILL, C.J., MARTIN, B., BYLES, J., BRAMWELL, B., and BLACKBURN, J.)

REG. v. WHITE AND OTHERS.(a)

*Parent and child—Abandonment and exposure—Father's duty—
24 & 25 Vict. c. 100, s. 27.*

A mother of a child under two years of age brought it and left it outside the father's house (she not living with her husband, the father of it). He was inside the house, and she called out, "Bill, here's your child; I can't keep it. I am gone." The prisoner some time afterwards came out, stepped over the child, and went away. About an hour and a half afterwards the father's attention was again called to the child still lying in the road. His answer was, "it must bide there for what he knew, and then the mother ought to be taken up for the murder of it." When his attention was called to it again, he said "he should not touch it; those that put it there must come and take it." Later on the child was found by the police in the road, cold and stiff; but by care it was restored to animation.

Held, that the father was properly convicted of abandoning and exposing the child within the meaning of the 24 & 25 Vict. c. 100, s. 27.

CASE reserved for the opinion of this Court at the Winchester Michaelmas Quarter Sessions 1870.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The prisoners were indicted at the Quarter Sessions for the county of Southampton, held at Winchester on the 19th of October, 1870, under the Act 24 & 26 Vict. c. 100, s. 27, for that they did on the 1st of September, 1870, unlawfully and wilfully abandon and expose a certain child, then being under the age of two years, whereby the life of the said child was endangered.

It appeared from the evidence that Emily White (the wife of William White), who was not included in the indictment, was the mother of the child, which was about nine months old at the time mentioned in the indictment. On the 1st of September, 1870, she had an interview with her husband, from whom she had been living apart since the 11th of August of the same year, and asked him if he intended to give her money or victuals; he passed by her without answering, and went into his house. This was about 7 p.m. His mother, the prisoner Maria White, shut the wicket, of the garden, and forbade his wife from coming in. The wife then went to the door of the house, laid the child down close to the door, and called out, "Bill, here's your child; I can't keep it. I am gone." She left, and was seen no more that night. Shortly after, William White came out of the house, stepped over the child, and went away. About 8.30 p.m. two witnesses found the child lying in the road outside the wicket of the garden, which was a few yards from the house door; it was dressed in short clothes, with nothing on its head; they remained at the spot till about 10 p.m., when William White came home. They told him that his child was lying in the road. His answer was, it must bide there for what he knew, and then the mother ought to be taken up for the murder of it.

Another witness, Maria Thorn (the mother of his wife) deposed also to the fact that about the same time, in answer to her observation that he ought to take the child in, he said, he should not touch it; those that put it there must come and take it. She then went into the house. About 11 p.m. one of the two witnesses went for a police constable, and returned with him to the place about 1 a.m., when the child was found lying on its face in the road, with its clothes blown over its waist, and cold and stiff. The constable took charge of it, and by his care it was restored to animation. At 4.30 a.m. the constable went to the house, and asked William White if he knew where his child was. He said, "No." On being asked if he knew it was in the road, he answered "Yes." It appeared that, during the time which elapsed between William White leaving his house about 7 p.m., and his return about 10 p.m., he had been to the police constable stationed at Beaulieu, and told him that there had been a disturbance between him and his wife, and wished him to come up and settle it, but he did not say anything about the child.

The prisoner's counsel objected that, upon these facts, there was no evidence of abandonment or exposure under the Act by William White.

He also objected that there was no evidence against John White and Maria White.

The Court were of opinion that there was no evidence against the two last-named prisoners, but overruled the objection as to William White, as to whom the case was left to the jury, who found him guilty.

The Court, upon the urgent appeal of the prisoner's counsel, consented to reserve a case for the opinion of the Court for the Consideration of Crown Cases Reserved; and the question is, whether the prisoner William White was or was not properly convicted upon the facts as above stated.

Judgment upon the conviction was postponed, and the prisoner remitted to prison, to be discharged on recognizance of bail to appear to receive judgment when called upon. The prisoner was subsequently admitted to bail, and released.

W. CLEMENT E. ESDAILE.

No counsel appeared on either side.

BOVILL, C.J.—I am of opinion that the conviction is right and ought to be confirmed. The prisoner was indicted for unlawfully and wilfully abandoning and exposing a child under two years of age, whereby the life of the child was endangered. The child was the child of the prisoner, and the facts are: [His Lordship stated the facts, and continued:] On these facts it was objected that there was no evidence of abandonment or exposure within the meaning of the statute. The words of the statute are "whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been, or shall be likely to be, permanently injured, shall be guilty of a misdemeanour." If either branch of the section is proved, or there is evidence in support of it, the conviction was right. Now, the father was entitled to the custody and possession of the child and he was entitled to exercise control over it, and was bound to maintain and provide for it, and to protect it, both morally and legally. The prisoner was aware that the child was lying at his door, and there was clear evidence that he knew it was there, and therefore he had the opportunity of protecting it. The only question is, was there evidence for the jury in support of the conviction; and I am clearly of opinion that there was evidence on which the jury might, and ought to, have convicted the prisoner. The child was lying in the road exposed, and its life was endangered, and in consequence of the exposure it was nearly dying. The relationship of a father as regards his duty to his child is different from that of any other person, and in this case there was abundant evidence both of exposure and abandonment of the child by the prisoner.

MARTIN, B.—I concur. At one time I had some doubt upon the construction of the statute. The meaning of the enactment struck me at first as being that the person guilty of the offence of abandoning and exposing a child should have been in the actual

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possession of the child. But there is no doubt that a father is bound to maintain and support his child; and, upon the facts in this case it may be said, without straining the language of the statute, that the prisoner was guilty of abandoning and exposing his child within the meaning of the statute.

BRAMWELL, B. I am of the same opinion. If some one who had the child to nurse had brought it and left it, as was done in this case, no one could have doubted that the prisoner under the circumstances had abandoned and exposed it; and it is just the same now, though the mother brought the child.

BLACKBURN, J.—I am of the same opinion. I agree that the other prisoners were entitled to be acquitted, although they had not performed their duty, for their duty was one of imperfect obligation. But the father is in a different position: he is under a legal obligation to support and provide for his child, and he would be guilty of murder, or manslaughter at the least, if in consequence of his neglect of duty the death of his child were to follow. It does not depend on the father having the actual physical custody of his child; for as soon as he knows that his child is in a position of danger, as in this case, and he neglects his duty, he has abandoned and exposed his child within the meaning of the Act.

CHANNELL, B.—I represent my brother Byles, who formed one of the Court when this case was called on, and I am authorised by him to say that he agrees in the judgment of the other members of the court. For myself I may say, that I have had an opportunity of consulting with the other members of the Court, and that I am of the same opinion.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

SITTINGS AFTER EASTER TERM, 1871.

May 8 to 15.

(Before COCKBURN, C.J.)

REG. v. BOULTON AND OTHERS. (a)

Conspiracy—Pleading—Indictment—Jurisdiction—Joinder of defendants in respect of offences unconnected with each other—Acts done out of the jurisdiction—Evidence of conspiracy—Letters which have not been answered—Evidence—Practice—Conduct of the police—Searching premises and examining the person.

On an indictment for conspiracy, it is not proper to include defendants who have not been privy to the acts relied upon as proof of the alleged conspiracy, and whose offences, whatever they may have been, are wholly separate and distinct. And if the proof of the alleged conspiracy consists of proof that the substantive crime has been committed, however legal such a course may be, it is not satisfactory (following the opinion of Lord Cranworth in Reg. v. Rowlands (5 Cox C. C. 497.).

On an indictment in which four defendants were charged with conspiring to incite the public to crime, and also in separate counts were charged each with conspiring with some other to commit the substantive crime: Held, that the evidence under the two heads of offence was in its nature entirely distinct; that, under the former head, only such acts as were done in public were admissible, and under the latter head, only such acts as were inter se. To include in the indictment defendants whose offence, if any, came under the latter head, was unfair and unjust, as tending to involve them in the odium of acts to which they were not parties.

As to two of the defendants, the only evidence was of letters to a third defendant, not shown to have been answered. Held, to be no evidence of conspiracy.

Acts by the defendants done in Scotland were tendered in evidence: Held, that, not being within the jurisdiction of arrest, these were not admissible in evidence.

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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The police having, without warrant or magisterial authority, searched the residence of the defendants, and arrested them, and brought them to this country for trial, such acts were held to be unlawful.

And the police having also, as they said, with magisterial authority, examined the persons of others of the defendants: Held, that such examination was unlawful.

INDICTMENT(a) for conspiracy to commit, or to incite to the commission of felonious and unnatural crime.

The indictment was against Lord Arthur Clinton, Ernest Boulton, Frederic Park, Louis Hurt, John Fiske, Martin Cumming, William Sommerville, and C. H. Thomas. The *first count* charged that, on the 1st of January, 1868, and on divers days and times between that day and the taking of the inquisitions (May, 1870) they unlawfully and wickedly did conspire and agree, together with Albert Wight and divers other persons unknown, to commit, &c. *Second count*, that they did conspire with Wight and others to solicit and incite unknown persons to commit, &c. *Third count*, that Clinton, Boulton, and Park did conspire to commit the crime. *Fourth count*, that Clinton and Boulton conspired to commit with each other the crime. *Fifth count*, that Clinton and Park conspired to commit the crime. *Sixth count*, that Boulton and Park conspired to commit the crime. *Seventh count*, that Boulton and Park did conspire to solicit and incite Clinton to commit the crime. *Eighth count*, that Boulton and Park conspired to incite and solicit Thomas and Clinton to commit the crime. *Ninth count*, that Boulton and Park conspired to incite Clinton to commit the crime with Park. *Tenth count*, that Boulton and Park conspired to incite unknown persons to commit the crime with Boulton. *Eleventh count*, that Boulton and Park conspired to incite unknown persons to commit the crime with Park. *Twelfth count*, that Hurst and Boulton conspired to commit the crime with each other. *Thirteenth count*, that Somerville and Boulton conspired to commit the crime. *Fourteenth count*, that Fiske and Boulton so conspired.

There was a second indictment for public indecency.

Sir R. Collier, A.G., Sir J. Coleridge, S.G., H. James, Q.C., H. Giffard, Q.C., Archibald and Poland for the prosecution.

Sir J. Karslake and F. H. Lewis for Hurst.

Parry, Serjt., and Straight for Park.

Ballantine, Serjt., and Digby Seymour for Boulton.

H. Matthews, Q.C., Sleigh, Serjt., and Powell for Fiske.

The other defendants did not appear.

The indictment was prepared for the Central Criminal Court under the *fiat* of the Attorney-General, and was removed by *certiorari*.

On the 28th of April, 1870, Boulton and Park, two young men,

(a) Presented and found at the Central Criminal Court without any allegations of facts within the jurisdiction.

were taken into custody in women's dresses coming from a theatre in company with a third named Mundell, who was dressed in his proper attire. The two first acknowledged their sex, but were detained; Mundell was liberated. It was discovered that they had rooms in Wakefield-street, Regent-square, where there was a great quantity of women's dresses and ornaments, and that they had for some time been in the habit of going thence dressed as women, to theatres and public places of amusement, and sometimes walking in the streets so attired. While Park and Boulton were in custody, they were examined by a police-surgeon, who stated that there were appearances of the commission of the crime, and they were committed upon that charge, which, however, was afterwards abandoned, and the present charge preferred. In the meantime, their letters being seized, it was discovered that they corresponded with the other defendants—with Hurst and Fiske, who lived at Edinburgh, and with Clinton and Sommerville elsewhere, and that Thomas sometimes came to the lodgings. It was also found that Clinton and Boulton had lodged together in Southampton-street, Strand. Whereupon, without application to a magistrate or any legal ceremony, their rooms were also searched, and at Lord Clinton's lodgings letters from Boulton were found; at Hurst's, letters from Fiske; at Fiske's, letters from Hurst. Letters from Hurst to Boulton were also found, but none from Boulton or Park to Hurst or Fiske. Thereupon the present indictment was preferred, in which Hurst and Fiske, Sommerville and Thomas were included, as well as Lord Clinton; the charge, it will be seen, dividing itself into two branches—a *general* conspiracy to debauch the public, and several *separate* conspiracies to debauch each other.

The evidence was chiefly and almost entirely directed against Clinton, Boulton, and Park; and against Sommerville, Hurst, and Fiske; and these two heads of evidence were almost entirely distinct.

As regarded Boulton and Park there was evidence that for some time prior to their arrest, and, indeed, during the period covered by the indictment (*i.e.*, from January, 1868, to April, 1870) they had been in the habit of going about to public places of amusement in women's dresses, and of walking in such dresses at all hours of the night in the streets. But the evidence of this was slight and little reliable, except as to a short period prior to their arrest, that is, the early part of 1870. Some evidence was given that their dresses were of such a character as to create the impression that they were women of loose character; and some evidence, but very slight and not very reliable, was given, that they had on one or two occasions used gestures such as such women would use. But except this slight and unreliable evidence, there was no evidence of public incitement, and the only witness called for the prosecution to show that they had addressed gentlemen when in female attire—Mr Mundell—proved that they only accosted him in consequence of his following them; that they

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distinctly told him they were men, and that no indecency or impropriety occurred. There was no evidence that, except in his case, they ever took anyone home with them; and, on the contrary, the evidence was that they always went out and came back themselves, and only spoke with those of their own party.

It was proved that, now and then, Park and Boulton would sleep a night or two at the house in Wakefield-street (where they had the dresses), and, as they had no regular lodgings, and only took them for the night, it once or twice happened that there was only one bed vacant, and that thus they slept together. Similar evidence was given as to Thomas and another of the defendants who sometimes came there for a night or two, and had lodgings on another floor. But this was only on rare occasions, when they happened to have been out at the theatre, and it was proved by the landlady that she never observed any appearance of indecency or impropriety.

Such was the evidence as to Park and Boulton, and it was only as to them that there was any evidence with reference to the public.

As regarded Lord Clinton, Boulton, and Park, Sommerville and Thomas, and Hurst and Fiske, the only evidence was on the *separate* charges of conspiracy to debauch each other. Under this head, as regarded Lord Clinton and Boulton and Park, the only evidence was that of a servant girl at Lord Clinton's lodgings in Southampton-street, Strand, that for two or three months (October and November, 1868) Boulton lodged there with him, in female costume, as his wife, always dressed as a woman, wearing a wedding ring, called by a female name, "Stella," sleeping with him constantly, and described by him as his wife. And some similar evidence was given as to Park. But all this, except the visit, was contradicted by the four other inmates of the house, all called for the defence—that is, the landlady, the other servant, and two other lodgers—all of whom swore that Boulton was always dressed as a man; that he was always called Ernest; that he did not wear a ring; and that he always slept by himself, and never with Lord Clinton; and that when Park came, as he did once or twice, he slept on a couch. Moreover, the mother of the prisoner Boulton proved that she was cognizant of the visit, and called at the lodgings once or twice with her husband to see him.

The above was the only evidence against Clinton, Park and Boulton, with reference to each other, except the letters, in which allusions were made to Boulton as Clinton's wife, and to Park as his wife's sister and as "Fanny," and to matrimonial squabbles between them.

Then, as regarded Hurst and Boulton, the evidence for the prosecution was that Boulton had visited him at Edinburgh; and it was sought to prove that they had slept together, but this broke down; and it appeared, on the contrary, that Boulton had a separate bedroom, for which Hurst had paid. There was nothing else in addition, except some letters of Hurst to Boulton,

couched in terms of much personal fondness, addressing him as "my darling Ernie," and so on. This was all the evidence as against Hurst, except that he had paid a small bill for making up a female dress for Boulton, which, however, it appeared, was not to be worn during the visit; and it appeared from Hurst's letters that he disapproved of the practice, and only paid this bill because he did not like his friend to leave bills unpaid behind him, and that he rebuked him rather for his inattention to money matters. There were no answers to his letters in evidence.

With regard to Fiske, the only evidence was that, being a friend of Hurst's, he had made Boulton's acquaintance at Edinburgh during his visit to Hurst, and that he had written to him afterwards some letters couched in terms of warm affection and admiration, in one of which he described him as combining the charms of "Lais and Antinous." It also appeared that he had photographs of Boulton in female *costume*; but it appeared that these were in theatrical characters, and were purchased. But it does not appear that the letters were ever answered or responded to.

It appeared that when Park and Boulton were originally apprehended, it was only on a charge of misdemeanour, on which they might have been bailed, and when they were about to be bailed, a police-serjeant, acting, as he said, on the order of the magistrate, had the prisoners forcibly examined in the police cells, and on that examination gave evidence tending to prove the commission of the capital crime, evidence on which bail was refused.

COCKBURN, C.J., expressed himself strongly of opinion that the conduct of the police in this matter had been entirely unwarrantable and illegal, and he refused to believe that any magistrate could have ordered it.

For the defence, evidence was given by Boulton's parents that Boulton, who was of very delicate form and feminine features, had from childhood a strong inclination to assume female characters; that as he grew up he showed an increasing fondness for dramatic performances, in which he always assumed such characters, and that he often played in private theatricals. That in 1867 his family first made the acquaintance of Lord Arthur Clinton, who had also a strong taste for dramatic entertainments, and who visited at their house and became intimate with them. That in 1868 he invited Boulton to go with him to Scarborough, where they gave public dramatic entertainments, in which Lord Arthur often played the part of husband, and Boulton the part of wife; that on their return to London Boulton, with the full knowledge of his parents, visited Lord Arthur, as already described, having a separate bedroom. That in 1869 he went with Park—a friend of his—a theatrical tour in Essex, where Park lived, and where they played in all the towns of the county, Boulton always playing female characters, and Park generally doing so. That in 1870, on their return to town, they took a room in the house at Wakefield-street, to deposit their theatrical

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dresses, and occasionally to sleep there when they had been at the theatre (their parents residing out of town) ; and that it was only for a short period before their arrest they had pursued the practice, only as a frolic, of going about in female dresses.

Lastly, medical evidence was given which showed that, during the whole period covered by the alleged conspiracy, Boulton was labouring under fistula.

As to Hurst and Fiske, as already mentioned, there was no evidence but their letters, to which there were no answers, and the expressions in which were explained ; and there was strong evidence as to character.

As to Sommerville, there was no evidence except two letters to Boulton, couched in terms of strong affection. But no answer was proved.

As to Thomas, the only evidence was that he was acquainted with Boulton and Park, and sometimes slept at the house in Wakefield-street.

Lord Arthur Clinton had died. Sommerville and Thomas did not appear.

At the close of the case for the prosecution,

Sir *J. Karlake* and *Matthews* objected, on the part of Hurst and Fiske, that there was no evidence.

COCKBURN, C.J., would not stop the case ; but next day, after consulting his brethren, said he thought, as at present advised, there was some evidence, but only in the count as to Boulton, and he should reserve the point.

Parry, Serjt., and *Seymour* (for Park and Boulton), went to the jury as to the credibility of the testimony, and the actual commission of crime by those two defendants. Admitting that if it was proved, the conspiracy to commit it was proved.

COCKBURN, C.J., observed that this by no means necessarily followed ; for, as the prosecution had chosen so to shape their case that the proof they gave of the conspiracy was the proof of the commission of the crime, they must also prove that it was in pursuance of the conspiracy they had laid.

Parry urged that the only evidence of the conspiracy was the commission of the crime ; that this was insufficient (for which reason that charge had been abandoned), and that the Crown were trying indirectly to get a conviction for conspiracy to commit the crime, by insufficient or unreliable evidence of the commission of the crime.

Sir *J. Karlake* and *Matthews* for Hurst and Fiske.

Sir *R. Collier*, A.G., in reply, abandoned the case as to actual commission of the crime by any of the defendants, admitting he could not substantiate it, but he pressed the case as to conspiracy to incite to crime.

COCKBURN, C.J., summed up. This case has deepened the conviction which I have long entertained as to the necessity for a public prosecutor to conduct and control future prosecutions. The act of the police-surgeon in examining the person of

the prisoner as he did, without any legal authority, was wholly unjustifiable. He had no more right to do it than he would have to inflict such an indignity on any person in custody, or any person he met in the streets. The seizure of the letters of the other defendants also appears to have been without any legal warrant or authority. [With regard to the general nature of the indictment for conspiracy, and the mode in which it had been attempted to support it, the Lord Chief Justice said:] The case is one which requires the utmost discrimination and care, not only on account of the interests of the accused but of the interests of public justice, and especially with reference to the form in which it is presented to you. We are trying the defendants for conspiring to commit a felonious crime, and the proof of it, if it amounts to anything, amounts to proof of the actual commission of crime. Now I must say that this is not a course which commends itself to my approval. I am clearly of opinion that where the proof intended to be submitted to a jury is proof of the actual commission of crime, it is not the proper course to charge the parties with conspiring to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused; the prosecutors are thus enabled to combine in one indictment a variety of offences, which, if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others, and deprive defendants of the advantage of calling their co-defendants as witnesses. I do not say this merely on my own authority, I have the authority of the late Lord Cranworth—one of the ablest of our judges—for the view I have expressed. In a case(a) before him, in which the parties had been indicted, not for the offence they had committed, but for conspiracy to commit it, that eminent judge said that such a course was no doubt legal, but that it would have been more satisfactory if they had been indicted for that which they had done, and not for conspiring to do it. I entirely adopt that view, and think that it would have been far better if these parties who are brought before you on one common indictment, for offences essentially several and distinct, had been respectively indicted and put upon their defence for the offences they had respectively committed; but, as it is, we can only consider the case, as it is now presented to us, on one indictment. There is here, however, another observation to be made, that the parties are not, upon this indictment, merely charged, as they are in another indictment, with an offence against public decency, but with conspiring to commit a felony. Now you must carefully keep in mind the distinction between the two charges, especially as the evidence on this indictment is in substance the same as would be given on the other. Upon the present indictment, unless you are quite satisfied of the conspiracy and purpose to commit the felony, then, however offensive and repulsive the conduct of the parties may have been

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you cannot commit them upon this indictment. The case divides itself into two main branches; first, that part of the indictment which charges generally a conspiracy between all the defendants to incite the public to commit the felony; and next, that part which charges them separately, two in one count and two in another, with conspiracy to commit or to incite each other to commit the offence. These two heads of charges are entirely different and distinct; for in the former you have to look only to the public conduct of the defendants, while in the other you have to look only to their private acts and conduct, and relations with each other. On the first head of charge, no doubt there had been great indecency and impropriety of conduct; but you must not allow your indignation at these indecent proceedings to warp your judgment in trying the far more serious accusation which is before you, and the question is, whether from this conduct, considered with reference to the other facts in the case, you can draw the conclusion that the defendants, in thus acting, had the intention and design imputed to them. And it is necessary for you to consider whether the inference you might otherwise have drawn is not rebutted by the evidence as to the use of the dresses for theatrical characters and performances. There was undoubtedly a lawful occasion for the purchase of the dresses, and there is evidence that they were originally used for that purpose. Then, on the other hand, there is no evidence of anything like solicitation or actual incitement to any of the public; on the contrary, the evidence is rather that they kept themselves to their own party. So much as to that part of the case which relates to the public. Then, as to that part of the indictment which refers to the private relations between the parties, and in particular with reference to Lord Arthur Clinton and Boulton. The preponderance of evidence was in favour of the accused, and the letters were explainable, with reference to the assumption of theatrical characters. So, as to the two defendants, Park and Boulton, their lodgings appeared to have been originally taken and used for the purpose of theatrical performances, and afterwards for the purpose of that foolish masquerading at theatres. With reference to the case as between Boulton and Hurst also, there is evidence to explain it. As to the joinder of Hurst and Fiske, I am of opinion that they ought never to have been put upon their trial in this country at all. In the first place, gross injustice is done to them, as they are mixed up with matters with which they had nothing to do (the theatrical dresses and the masquerading at theatres), and which are naturally calculated to create great prejudice against them, and thus the fair administration of justice is most seriously compromised. And again, in order to commit Hurst and Fiske, you must be satisfied that they were parties to a conspiracy in this country; for we have no jurisdiction as to what may have taken place in Scotland. If there was a conspiracy in Scotland to commit or incite to immorality in that country, the case should be tried in the courts of that country. It is oppressive to a man to try him at a dis-

tance from the place of his residence, and at a place where he may be unable to procure witnesses to attend, unless it is in the place where he committed the offence. But here I am of opinion that any offence which may have been committed by these parties, if any was committed, was committed in Scotland, and not in this country, and it is there they ought to have been tried. As it is, they have suffered great injustice, entirely through the conduct of the police, and the whole course of the case has confirmed me in the opinion I have long entertained as to the necessity for a public prosecutor, to conduct and to control criminal prosecutions. The police seized the prisoners' letters without warrant, and then, without any authority, searched the lodgings of Hurst and Fiske, at Edinburgh, and then arrested them and held them to bail, without taking them before a magistrate at all; and thus they are put upon their trial, with other persons, for an alleged offence having no connection whatever with their own conduct. The case, as regards the two Scotch defendants, appears to rest chiefly on letters, and these are letters to a third person, Boulton, and these letters unanswered and not shown to have been followed out by acts. But the charge is conspiracy, and conspiracy implies the common action of two minds. A man cannot conspire with himself; there must be two parties to a conspiracy, and there is nothing to show, even putting the worst construction on the letters, that Boulton concurred in them. Where, then, is the evidence of the conspiracy? There is no kind of connection or correspondence shown between Hurst or Fiske and any other of the defendants, except Boulton; and as to Boulton, the evidence consists only of letters from them to him, not shown to be answered. There is no evidence of any response to them, or even of a reception of them and assent to them, in the sense suggested on the part of the prosecution. The indictment is not for incitement to immorality, but for conspiracy to commit it; and to make out a conspiracy there must be the concurrence of two minds, of which, in this case, there is no evidence, for the prosecution have not shown that the letters were received or responded to in the sense suggested. (a)

Verdict, Not guilty.

(a) The defendants Park and Boulton were held to bail before the Lord Chief Justice, to appear and answer to the second indictment when called upon; and at the next sitting they entered into recognizances to be of good behaviour, and were then discharged—it being understood that the prosecution, except in the event of any repetition of the offence, would be abandoned.

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COURT OF CRIMINAL APPEAL.

June 3, 1871.

(Before COCKBURN, C.J., CHANNELL, B., WILLES, J., MELLOR, J.,
and M. SMITH, J.)

REG. v. BALLS. (a)

*Embezzlement—Charging a gross sum in indictment—Evidence—
24 & 25 Vict. c. 96, s. 71.**It was the duty of an agent and collector of a coal club to receive payments by small weekly instalments, and to send in weekly accounts on Tuesdays, and on each Tuesday to pay the gross amount received into the bank to the credit of the club.**An indictment charged the agent with embezzling 1l. 1s., and evidence was given that during a certain week payments of ten smaller sums, making together 1l. 1s., had been made to the agent, and that the prisoner failed to account for those sums, or for any specific sum of 1l. 1s.**There were two other counts containing charges of embezzlement of two other sums of 1l. 7s. and 1l. 5s., and supported by similar evidence.**Held, that the indictment might properly charge the embezzlement of a gross sum, and be proved by evidence similar to the above, and that it was not necessary to charge the embezzlement of each particular sum composing the gross sum, and that, although the evidence might show a large number of small sums embezzled, the prosecution was not to be confined to the proof of three of such small sums only.***C**ASE reserved for the opinion of this Court by Mr. Commissioner Kerr at the Central Criminal Court.

At a session of the Central Criminal Court, on Tuesday, the 2nd of May, 1871, Edmund Balls was tried before me on the following indictment:—

The first count charged “that he, being a member of a certain co-partnership of persons trading under the name, style, and title of the Alliance Industrial and Provident Coal Society (Limited), did on the 5th of December receive into his possession the sum of 1l. 1s. in money, for, and on the account of the said co-partner-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

ship, and fraudulently and feloniously did embezzle the said sum of money."

The second count charged him with having within six months from the offence in the first count, that is to say, on the 12th of December, while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 7*s.*, and with having embezzled that sum.

The third count charged him with having, within six months from the offences in the first and second counts, that is to say, on the 19th of December, while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 5*s.*, and with having embezzled that sum.

It was proved that the prisoner was a shareholder in the society named; that he received dividends on his shares therein, and that he was also duly appointed an agent of the society, in which capacity it was part of his duty to collect moneys for the society in the manner hereinafter mentioned. He gave a bond for the faithful performance of his duties. It was his duty as such agent and collector to receive payments from numerous persons who bought coals from the society, for which they were to pay by weekly instalments. Of these payments, which were to be made weekly, it was his duty to send in weekly accounts on the Tuesday of every week. And it was his duty on the Tuesday of every week to pay the gross amount received by him in the course of the preceding week into a bank to the credit of the society.

The prisoner did in fact pay money into the bank to the credit of the society every week, both before, during, and after the time covered by the three several counts of the indictment. On some occasions he paid into the bank a larger sum than by his account of the previous week's collection he ought to have done.

To prove the allegation in the first count of the embezzlement of the sum of 1*l.* 1*s.* on the 5th of December, it was proposed by the counsel for the prosecution to give evidence of ten different payments in the course of the week ending on such 5th of December; that these payments were made to the prisoner by ten different persons, and that the several small sums so paid to him amounted in the whole to 1*l.* 1*s.* It was also proposed to prove that neither in the prisoner's account, sent in by him on the 5th of December, when he ought to have accounted for the previous week's collection, nor in any subsequent account did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 1*s.*

To prove the allegation in the second count of the embezzlement of the sum of 1*l.* 7*s.* on the 12th of December, it was proposed also to prove by ten different witnesses ten different payments in the course of the week ending on that day; that the several small sums so paid amounted in the whole to 1*l.* 7*s.*; and that neither in the prisoner's account sent in by him on the said 12th of December, nor in any subsequent accounts, did the

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*June 3, 1871.**(Before COCKBURN, C.J., CHANNELL, B., WILLES, J., MELLOR, J.,
and M. SMITH, J.)**REG. v. BALLS. (a)**Embezzlement—Charging a gross sum in indictment—Evidence—
24 & 25 Vict. c. 96, s. 71.**It was the duty of an agent and collector of a coal club to receive payments by small weekly instalments, and to send in weekly accounts on Tuesdays, and on each Tuesday to pay the gross amount received into the bank to the credit of the club.**An indictment charged the agent with embezzling 1l. 1s., and evidence was given that during a certain week payments of ten smaller sums, making together 1l. 1s., had been made to the agent, and that the prisoner failed to account for those sums, or for any specific sum of 1l. 1s.**There were two other counts containing charges of embezzlement of two other sums of 1l. 7s. and 1l. 5s., and supported by similar evidence.**Held, that the indictment might properly charge the embezzlement of a gross sum, and be proved by evidence similar to the above, and that it was not necessary to charge the embezzlement of each particular sum composing the gross sum, and that, although the evidence might show a large number of small sums embezzled, the prosecution was not to be confined to the proof of three of such small sums only.**CASE reserved for the opinion of this Court by Mr. Commissioner Kerr at the Central Criminal Court.**At a session of the Central Criminal Court, on Tuesday, the 2nd of May, 1871, Edmund Balls was tried before me on the following indictment:—**The first count charged “that he, being a member of a certain co-partnership of persons trading under the name, style, and title of the Alliance Industrial and Provident Coal Society (Limited), did on the 5th of December receive into his possession the sum of 1l. 1s. in money, for, and on the account of the said co-partner-**(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.*

ship, and fraudulently and feloniously did embezzle the said sum of money."

The second count charged him with having within six months from the offence in the first count, that is to say, on the 12th of December, while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 7*s.*, and with having embezzled that sum.

The third count charged him with having, within six months from the offences in the first and second counts, that is to say, on the 19th of December, while he was a member of the said co-partnership, received on account of the said co-partnership the further sum of 1*l.* 5*s.*, and with having embezzled that sum.

It was proved that the prisoner was a shareholder in the society named; that he received dividends on his shares therein, and that he was also duly appointed an agent of the society, in which capacity it was part of his duty to collect moneys for the society in the manner hereinafter mentioned. He gave a bond for the faithful performance of his duties. It was his duty as such agent and collector to receive payments from numerous persons who bought coals from the society, for which they were to pay by weekly instalments. Of these payments, which were to be made weekly, it was his duty to send in weekly accounts on the Tuesday of every week. And it was his duty on the Tuesday of every week to pay the gross amount received by him in the course of the preceding week into a bank to the credit of the society.

The prisoner did in fact pay money into the bank to the credit of the society every week, both before, during, and after the time covered by the three several counts of the indictment. On some occasions he paid into the bank a larger sum than by his account of the previous week's collection he ought to have done.

To prove the allegation in the first count of the embezzlement of the sum of 1*l.* 1*s.* on the 5th of December, it was proposed by the counsel for the prosecution to give evidence of ten different payments in the course of the week ending on such 5th of December; that these payments were made to the prisoner by ten different persons, and that the several small sums so paid to him amounted in the whole to 1*l.* 1*s.* It was also proposed to prove that neither in the prisoner's account, sent in by him on the 5th of December, when he ought to have accounted for the previous week's collection, nor in any subsequent account did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 1*s.*

To prove the allegation in the second count of the embezzlement of the sum of 1*l.* 7*s.* on the 12th of December, it was proposed also to prove by ten different witnesses ten different payments in the course of the week ending on that day; that the several small sums so paid amounted in the whole to 1*l.* 7*s.*; and that neither in the prisoner's account sent in by him on the said 12th of December, nor in any subsequent accounts, did the

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prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 7*s.*

To prove the allegation in the third count, of the embezzlement of the sum of 1*l.* 5*s.* on the 19th day of December, it was proposed, in like manner, to prove by eleven different witnesses eleven different payments in the course of the week ending on that day; that the several small sums so paid amounted in the whole to 1*l.* 5*s.*; and that neither in the prisoner's account sent in by him on the said 19th day of December, nor in any subsequent accounts, did the prisoner account for those several sums, or any of them, nor for any specific sum of 1*l.* 5*s.*

The prisoner's counsel, who was absent while the case was being opened to the jury, objected that the course proposed to be taken would be admitting evidence of thirty-one different acts of embezzlement upon one indictment, whereas the statute only permitted evidence to be given of three. He contended that the non-accounting for each of these thirty-one sums was a separate and distinct act of embezzlement, and that only three of those acts could properly be included in one indictment.

On the other hand, the counsel for the prosecution contended that as it was the prisoner's duty to account once a week only for what he had received during the preceding week, there were only three distinct non-accountings, and, therefore, only three distinct acts of embezzlement; that the act of embezzlement was not committed upon receipt of the money, but upon the non-accounting and non-payment of it, if the jury should find such non-accounting and non-payment to be fraudulent.

I expressed my intention to confine the evidence to three separate and distinct receipts of three of the small sums so received by the prisoner as aforesaid, and to the non-accounting for the same; but, being pressed by counsel for the prosecution, I admitted the evidence so proposed to be given of the receipt by the prisoner of the thirty-one different sums, and of his non-accounting for the same.

This evidence was accordingly given, and the jury found that in not paying over on the 5th, 12th, and 19th days of December respectively each and every of the several small sums received by him in each and every of the several weeks ending on those days respectively, the prisoner did fraudulently embezzle each and every of the said several sums, and that those sums collectively amounted in each of those weeks respectively to the several sums named in the first, second, and third counts of the indictment.

Thereupon I directed a verdict of guilty to be recorded against the prisoner on each of these counts, subject to the opinion of the Justices of either Bench and Barons of the Exchequer, whether the evidence on which the prisoner was so convicted was properly admissible. If such evidence was not admissible in point of law, then the conviction of the prisoner is to be quashed. If properly admitted, then the conviction is to stand.

I postponed judgment, and allowed the prisoner to go out on

recognisance, with sureties for his appearance to hear judgment when called upon.

R. MALCOLM KERR,
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Collins, for the prisoner.—The evidence was wrongly admitted, and the conviction should therefore be quashed. The indictment is founded upon the 31 & 32 Vict. c. 116, s. 1, which enacts that a member of a copartnership who shall steal or embezzle any of the partnership property may be tried and convicted for the same as if he had not been a partner. Then the 24 & 25 Vict. c. 96, s. 71, enables a prosecutor to charge three distinct acts of embezzlement in an indictment. It is not competent to charge the embezzlement of a gross sum of 100*l.*, and support that by proof of several acts of embezzlement. By the finding of the jury each of the thirty-one sums must be taken as the subject of a distinct embezzlement. [COCKBURN, C.J.—The jury also add, “And that those sums collectively amounted in each of those weeks respectively to the several sums named in the first, second, and third counts of the indictment.”] The prosecutor ought to have been put to his election. In *Reg. v. Williams* (6 C. & P. 626), where the indictment charged the receipt of a gross sum on a particular day, and the evidence was that the money was received in different sums on different days, the prosecutor was put to his election and directed to confine himself to one sum and one day. [COCKBURN, C.J.—In that case the prisoner was bound to account for each sum and not for the gross amount. Here the prisoner was bound to hand in weekly accounts on the Tuesday in each week. It is an account of the aggregate of all he received.] That may be so in one sense, but nevertheless the thirty-one sums were distinct acts of embezzlement. [COCKBURN, C.J.—The prisoner might have been indicted for the embezzlement of each sum, but the question here is whether he did not embezzle the gross amount?] The moment three acts of embezzlement had been proved, the evidence ought to have been stopped: (1 Taylor on Evidence, 272.) If the jury had found simply that the sums charged had been embezzled, *Reg. v. Lambert* (2 Cox C. C. 309), would have applied. In that case the prisoner had debited himself with an amount forming the balance of a number of receipts and payments; and it was held that the offence was made out if the jury were satisfied that the prisoner received in the aggregate the amount with which he had charged himself, and that he absconded or refused to account, leaving a portion of the gross sum deficient; and that it was not necessary to prove that any particular sum or sums were received from any particular person. [MELLOR, J.—Have not the jury found not only that the prisoner embezzled each of the thirty-one sums, but the gross amount also? Is there anything to prevent the charging of three aggregate sums in an

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indictment? M. SMITH, J.—The indictment is right, and is supported by good evidence. Does it make it bad because the jury also say that they think each of the thirty-one sums was embezzled? CHANNELL, B.—There could have been no embezzlement until the Tuesday in each week. WILLES, J., referred to *Reg. v. Richardson* (8 Cox C. C. 448), and *Reg. v. Proud* (L. & C. 37; 9 Cox C. C. 22).]

Besley, for the prosecution, referred to *Reg. v. King* (24 L. T. Rep. N. S. 670; *ante*, p. 73.)

COCKBURN, C.J.—Without reference to *Reg. v. King*, we are satisfied that the conviction was right. We agree that where a man has to account for each sum that he receives, no more than three such receipts can be charged in an indictment. Even then, if it is necessary to explain the intention of the prisoner, and to show that the omission to account was not accidental or an oversight, evidence may be given of other instances to show a fraudulent intent. The present case is free from difficulty, for although any one of the receipts might have been charged as a distinct act of embezzlement, it is distinguishable from the ordinary case by the fact that the prisoner was only to account once a week and pay over the aggregate amount he had received during the week. The account must necessarily be made up of all the items composing the aggregate sum to show how that is made out, but the handing over is of one gross amount, and the prisoner might, therefore, be charged with embezzling the gross amount, and it was not necessary to charge the embezzlement of the different sums received. The evidence objected to was, therefore, admissible, and it would be mischievous if persons in such cases as these could not be convicted of embezzling a gross sum, especially as there is no rule of law against it.

The other learned judges concurred.

Conviction affirmed.

Attorney for the prosecution, *W. T. Ricketts*.

Attorney for the prisoner, *J. H. B. Wakeling*.

SOUTH WALES CIRCUIT.

GLAMORGANSHIRE SUMMER ASSIZES, 1871.

Cardiff, August.

(Before MONTAGUE SMITH, J.)

REG. v. JENKIN WILLIAMS.(a)

Practice—Depositions—11 & 12 Vict. c. 42, s. 17—Same offence.

Where a prisoner is charged before a magistrate with obtaining money by false pretences, and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction and being in fact identical, and the prisoner having had the opportunity of cross-examination before the magistrate:

Held, that the deposition of a witness taken at such hearing, and who was afterwards unfit to travel to give evidence, was admissible and might be read at the trial for uttering the forged promissory note.

JENKIN WILLIAMS was indicted for uttering, on the 24th of November, 1870, a forged promissory note (set out), with intent to defraud, &c.; and in a second count with uttering a forged promissory note with intent, &c. (not setting the note out.)

H. G. Allen appeared for the prosecution.

The principal facts of the case having been proved,

The deposition of one of the witnesses who was examined before the committing magistrates was proposed to be read, as such witness (a bank manager) was proved, to the satisfaction of the court, to be unable to attend to give his evidence.

It was objected to, however, on the ground that before the magistrate the charge against the prisoner was that of false pretences, whereas the indictment was for uttering a forged promissory note, and therefore the deposition was not receivable. It was, however, proved that the two charges were substantially the same, arising out of the same transaction, and the same evidence proving both, and that the prisoner had the oppor-

(a) Reported by E. JULYAN DUNN, Esq., Barrister-at-Law.

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tunity of cross-examination before the magistrate: (*Reg. v. Beeston*, Dears. C. C. 405; 6 Cox C. C. 425.)

Reg. v. Lee (4 F. & F. 63), and *Reg. v. Smith* (R. & R. 339), were cited.

In the latter case, the deposition of the deceased in an indictment for murder was held admissible, although taken when the prisoner was charged with an assault upon the deceased and also upon a charge of robbing a manufactory which the deceased had been employed to guard, and although part of the deposition was taken during the prisoner's absence, yet it appeared that deceased was afterwards re-sworn before the prisoner and his deposition read over and stated by the deceased to be correct, and the prisoner asked if he had any questions to put.

MONTAGUE SMITH thereupon allowed the bank manager's deposition, above referred to, to be read and received in evidence.

Verdict, Guilty.

COURT OF CRIMINAL APPEAL.

November 11, 1871.

(Before KELLY, C.B., BYLES, J., PIGOTT, B., LUSH, J., and HANNEN, J.)

REG. v. KNIGHT. (a)

Larceny—Lost bank note—Misdirection.

Prisoner received from his wife a 10l. Bank of England note, which she had found and passed it away. The note was indorsed "E. May" only, and the prisoner, when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and address. When charged at the police station, the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could, within a reasonable time, have found the owner, and if, instead of waiting, the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted.

Held, that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found; and that the conviction was wrong.

CASE reserved for the opinion of this Court.

At the general quarter session of the peace, holden by adjourn-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

ment at St. Mary, Newington, in and for the county of Surrey, on Wednesday, the 26th July, 1871, William George Green Knight was tried and convicted on an indictment, charging him in the first count with feloniously stealing 10*l.* in money, of the property of John Willimot Morgan; and, in the second count, with feloniously receiving the same money, well knowing it to have been stolen, upon the following evidence:—

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Richard Adye Bailey, clerk in the Bank of England, having been sworn, produced a cancelled note of such bank for 10*l.*, paid 31st May, 1871, No. 30,483, dated 22nd March, 1871, indorsed E. May; E. Randall, 8, Cowland-terrace, Wandsworth-road; G. Hollyman, 345, Wandsworth-road.

John Willimot Morgan, on his oath, stated as follows: "I am traveller and collector. On the 26th of May last, I received a 10*l.* note at Deptford, between one and half-past one o'clock, indorsed E. May. I put it in my left-hand waistcoat pocket. I went to South Bermondsey station, a quarter of a mile from where I received the note, and thence to Loughborough-park station. I called upon a customer in the Brixton-road. I walked from there to Clapham. I got there about three o'clock. It was the Oaks day. I walked along the Clapham-road. I put the note in my waistcoat pocket with my watch. I did not take out the note after. I missed it when I arrived at the office, Arthur-street, London-bridge. I went from Clapham station to the Borough-road station. I went the same night to Scotland-yard and gave information to the police. When at Clapham I went down High-street to Muswell's the butcher. I came up Acre-lane. I left Clapham at four o'clock by train."

George Hollyman, on his oath, stated: "I am a clothier, carrying on business at 345, Wandsworth-road. On the 26th of May last, the prisoner came to me between seven and eight o'clock in the evening. I knew him by sight. I did not know his name. He purchased a waistcoat, two pairs of drawers, and other things, together of the value of 12*s.* 9*d.* He tendered a Bank of England note for 10*l.* The note produced by the witness Bailey is the one. I asked prisoner to indorse it, which he did, 'E. Randall,' as on the note produced. I put my initials under his name and gave him change. The articles produced by witness Tucker are of the same description as those I sold to prisoner. I will swear they are the same."

George Tucker, metropolitan police-constable, 53 W. on his oath, stated: "I received a communication from the witness Hollyman. I apprehended the prisoner in the Wandsworth-road about 7.15, on Saturday, the 24th of June. I said to him, 'I shall place you under arrest for some illegal proceedings or transactions in passing a 10*l.* Bank of England note, and a gentleman will charge you at the station.' He did not say anything. I took him to the station. The sergeant there said to him, 'You are charged with illegally converting this note to your own use.' The prisoner said, 'I know nothing about the note.' He gave me

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his address, 2, Pensbury-street, Wandsworth-road, and gave me his latch key to be given to his wife. I took one pair of drawers from the prisoner, and detective Lonsdale brought me the waist-coat and other pair of drawers, which I now produce. When I apprehended him he said, 'All right, I will go with you.' It is wrong in the deposition, 'I know nothing about it.'"

The prisoner's statement before the committing magistrate was read as follows: "My wife found it in Clapham-road on the Oaks-day, from half-past four to five, between Manor-street and the Two Brewers. She left it till I came home from work at half-past six, and then told me what she had found. I said I did not think it was a good one, but I would take it to Mr. Hollyman and see if he could change it. I took it to him and thought no more about it. I had money to pay for the things in my pocket if it had not been all right. I did not come by it by dishonest means."

The counsel for the prosecution presented the case to the jury as a larceny of lost property by the finder.

The prisoner's counsel contended there was no evidence to show that the prisoner at the time when the note came into his possession had the intention of wrongfully and feloniously depriving the owner of his property, or that he knew or had any reasonable means of ascertaining to whom the note belonged (the only mark on the same when found being "E. May," not the name of the owner), and consequently, upon the authority of *Reg. v. Thurborn* (1 Den. C. C. 388; 3 Cox C. C. 453, *nomine Reg. v. Wood*); *Reg. v. Moore* (8 Cox C. C. 416); and *Reg. v. Glyde* (11 Cox C. C. 103), the prisoner ought to be acquitted, it being laid down that on each of those points (as well as the conversion) there must be evidence to satisfy the jury.

The Court, however, left the case to the jury, telling them that, if they were satisfied that the prisoner could within a reasonable time have found the owner, but, instead of waiting at all, he immediately converted the note to his own use by changing it, and that he intended to deprive the owner of the note against his will, it would be larceny, and in considering their verdict it would be right for them to remember the conduct of the prisoner, viz., that when asked by the person who changed the note to write his name and address on the back of the note, he wrote a false name and a false address, and when charged at the police station with the offence he said, "I know nothing about the note."

The jury returned a verdict of guilty.

The Court thereupon reserved for the decision of the Court for Crown Cases Reserved the question whether, under the circumstances, the conviction was right?

Judgment upon the prisoner was respited, and he was committed to the custody of the governor of the common gaol at Newington, in the said county, until the decision of the Court for Crown Cases Reserved should be known.

E. RICHARDS ADAMS, Chairman.

No counsel appeared to argue for the prisoner.

Oppenheim for the prosecution.—The question in this case is whether there was evidence to show that the prisoner, at the time he appropriated the note to his own use, believed he could find the owner of it. The case of *Reg. v. Glyde* decided that the finder of a sovereign in the high road who, at the time of finding, had no reasonable means of knowing who the owner was, but who, at that time, intended to appropriate it, even if the owner should afterwards be discovered, and to whom the owner was speedily made known, when he refused to give it up to him, was not guilty of larceny. That decision was come to on the ground that there was no evidence to show that when the prisoner picked up the sovereign he had any reason to believe that the true owner could be found. Here the evidence is different. [LUSH, J.—But that point was not put to the jury.] The question reserved for this Court is whether, under the circumstances, having regard to the prisoner's conduct in dealing with the note and denying all knowledge of it, the conviction was right. Now, may not the Court, after verdict, infer that the jury substantially found that point.

KELLY, C.B.—It is quite clear that this conviction cannot be sustained. There was no evidence that the prisoner, at the time when he first received this note from his wife, believed that the owner of it could be found; and if there had been, the proper question has not been left to the jury.

BYLES, J.—I also am of opinion that this conviction cannot be sustained. The prisoner found the note in his wife's hands, and he did not know who the owner was; and there is no evidence that he had the means of knowing. The appropriating it under these circumstances is not larceny.

PICOTT, B.—The question left to the jury, and which they have found, is whether they were satisfied that the prisoner could have found the owner within a reasonable time. That finding is quite consistent with this, that the prisoner himself believed he could not have found the true owner.

LUSH, J.—The real question for the jury in this case was, what was in the mind of the prisoner when the bank note first came into his possession. But without regard to his belief, the jury were asked whether they were satisfied that the prisoner could, within a reasonable time, have found the owner. The jury have thought that he could; the prisoner might have thought that he could not. The conviction cannot be sustained.

HANNEN, J. concurred.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

November 11, 1871.

(Before KELLY, C.B., BYLES, J., PIGOTT, B., LUSH, J., and
HANNEN, J.)

REG. v. MANNING AND ROGERS. (a)

*Arson—Building—Unfinished house—24 & 25 Vict. c. 97, s. 6.**An unfinished dwelling-house of which the external and internal walls were built, and the roof covered in, and a considerable part of the flooring laid, and the walls and ceilings prepared for plastering, is a building within 24 & 25 Vict. c. 97, s. 6, the unlawfully and maliciously setting fire to which is a felony.**Semble, that it is a question for the jury, whether the structure in question is a building.*

CASE reserved for the opinion of this Court by Martin, B.

The following is a copy of the indictment :

Lancashire, } The jurors for our Lady the Queen upon their
to wit. } oath present, that William Manning and John
Rogers, on, &c., at, &c., feloniously, unlawfully, and maliciously
did set fire to a certain building of one John Rhodes, there
situate, against the form of the statute in such case made and
provided.

It is obviously framed upon the 24 & 25 Vict. c. 97, s. 6.

The prisoners were members of a society or Union of Hand-made Brickmakers.

The building set fire to was one of seven built in a row, intended for dwelling-houses, and which were built in part of machine-made bricks. On the night of the 25th of June last the prisoners (and some others who escaped), set fire to it by means of paraffin oil. All the walls, external and internal, of the house were built and finished; the roof was on and finished; a considerable part of the flooring was laid; the internal walls and ceilings were prepared ready for plastering. The house was in a forward state towards completion, but was not completed.

At the conclusion of the case for the prosecution, it was objected

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

by the learned counsel for the prisoners that the erection set fire to was not a building within the meaning of the statute, because it was not completely finished.

I was against the objection, but it was stated that Lush, J., in a similar case (*a*), had expressed his intention to reserve the point for the opinion of the Court of Criminal Appeal, and at the request of the counsel I assented to take the same course.

I took the opinion of the jury, whether, as a question of fact, the erection was a building, and they found that it was. The prisoners were found guilty and sentenced, and are undergoing punishment.

I request the opinion of the Court upon two points.

First, was the question concluded by the finding of the jury?

Secondly, if it was not, was the objection made by the learned counsel for the prisoners a valid one?

SAMUEL MARTIN.

No counsel appeared to argue for either side.

KELLY, C.B.—We regret that we have not had the assistance of counsel, because the point reserved is a new and important one. Looking at the facts stated in the case, I am of opinion that it having been correctly left to the jury as a question of fact whether the erection was a building, the finding of the jury that it was is conclusive to show that this was a building within the meaning of the statute. The question turns upon the true construction of the 24 & 25 Vict. c. 97, s. 6, which enacts that “whosoever shall unlawfully and maliciously set fire to any building, other than such as are in this Act before mentioned, shall be guilty of felony.” The point therefore is, whether this structure was a building other than such as are in the Act before mentioned. The 3rd section enumerates the “buildings before mentioned” referred to in sect. 6, and they are “house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hopoast, barn, storehouse, granary, hovel, shed, fold, any farm building, any building or erection used in farming land or in carrying on any trade or manufacture, or any branch thereof.” Now the argument which may be urged as to the buildings enumerated in sect. 3 is that they would appear to be complete buildings, and that

(*a*) In *Reg. v. Edgell and Smith* (the case referred to), Central Criminal Court Sessions Papers, vol. lxvii. p. 78, the evidence as to the state of the building which was set fire to was as follows:

John Wilcock Jacob, examined.—It was my unfinished property where the fire took place. One of the treads of the stairs was burnt. The side of the stairs was not burnt much. The floor was burnt—that was part of the permanent floor. The buildings were covered in, the floors all laid, and the stairs up. This was one of a row of eight houses. The partitions were up, and everything ready for the plasterers but the lathing. There were no windows in, only the frames. There were no doors. The doorways were fastened up. It was an unfinished eight-roomed dwelling house.

LUSH, J. ruled that the building was not a house within the meaning of the statute, and said he would consider whether it was a building within the statute, and, if necessary, reserve the point.

The jury acquitted the prisoners, and it did not become necessary to decide the second point.

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therefore the buildings mentioned in sect. 6 must be *ejusdem generis*, and complete buildings. But on reading the 3rd section narrowly, it will be found to contain descriptions of buildings which are not in themselves complete buildings, but which may form parts of complete buildings, *e.g.*, "office" and "shop." Suppose a house being built, and that an office therein is completed, and yet the house unfinished: or suppose a house begun, and the shop completed and opened for business while the upper part of the house is being built, in these cases the office and shop would be buildings within sect. 3. Sect. 3, therefore, relates to buildings which may be complete or incomplete. I think that the ruling of the judge at the trial was correct, and that the question was for the jury. I give no opinion as to whether an unfinished building of which only the external walls are complete is a building within the meaning of this section; but where a house has advanced to the state in which this house was, I think it is a building within the meaning of the Act.

BYLES, J.—I am of the same opinion. I abstain from attempting to define the exact meaning of the word "building" in this section. It is sufficient to say that the structure now in question was a building within its meaning.

PICOTT, B.—I am of the same opinion. The jury having found that this structure was a building, though not complete, I think it was a building within the meaning of sect. 6.

LUSH, J.—I am of the same opinion. To constitute a building within the meaning of sect. 6, it is not necessary that the structure should be completed for its intended purpose; it is sufficient if it has advanced so far as to have acquired the character of an entire building. I think that an unfinished house of which the walls had only been built four feet high, would not be a building within the section. Here all the walls, external and internal, being complete, and the roof covered in, I think this was a building within the section.

HANNEN, J.—A house, I think, means a building sufficiently advanced to be ready for the habitation of man, and a structure may be a building otherwise than a house within sect. 6, though it was only advanced so far as the one in question.

Conviction confirmed.

COURT OF CRIMINAL APPEAL.

November 11, 1871.

(Before KELLY, C.B., BYLES, J., PIGOTT, B., LUSH, J., and HANNEN, J.)

REG. v. CHAMBERS. (a)

Forgery—I O U—Surety—24 & 25 Vict. c. 98. s. 23.

The prisoner, being pressed by a creditor for the payment of 35l. obtained further time by giving an I O U for 35l., signed by himself, and also purporting to be signed by W. W.'s name was a forgery :

Held, that the instrument was a security for the payment of money by W., and that the forgery of his name was a felony within the 24 & 25 Vict. c. 98, s. 23.

CASE reserved for the opinion of this Court by Blackburn, J.

The prisoner was tried before me on an indictment for feloniously forging an instrument which was set out in the indictment in the words and figures following :

“Nov. 21, 1870.
I O U thirty-five pounds.
£35. ARTHUR CHAMBERS.
 GEORGE WICKHAM.”

It was described in one count as an undertaking for the payment of money, and in another as a security.

On the trial evidence was given that the prisoner having obtained a loan of 35l., and being pressed for payment, obtained further time by giving as a security the instrument which purported to be signed by his brother-in-law, George Wickham.

It was objected that though, if the instrument had been genuine it might have been evidence of an account stated by Wickham, from which the law would have implied a promise on his part to pay the money, and so would in effect operate as an undertaking to pay the money, and as a security for its payment ; yet it was not in itself either one or other.

I reserved the point, and left to the jury whether the instrument was forged by the prisoner with intent to defraud.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The verdict was guilty.

There was a second indictment against the prisoner on the same facts for a misdemeanor at common law for forging and uttering the same instrument.

After the first trial he withdrew the plea of not guilty to this indictment, and pleaded guilty to it.

I sentenced him to eight months' imprisonment on the indictment for misdemeanor, and to four months' imprisonment with hard labour on the indictment for felony, the latter sentence not to come into operation till after the decision of this Court on the point reserved.

The question is whether the instrument in question was either an undertaking or a security within the meaning of the 24 & 25 Vict. c. 98, s. 23. (a)

If that question is answered in the affirmative, the sentence of imprisonment with hard labour is to come into operation concurrently with the residue of the sentence of imprisonment. If answered in the negative it is not to come into operation.

COLIN BLACKBURN.

No counsel appeared to argue on either side.

KELLY, C.B.—The question in this case is whether the instrument set out in the indictment is an undertaking or security for the payment of money within the 24 & 25 Vict. c. 98, s. 23, and the forgery thereof an offence within its provisions. The facts are, that the prisoner having obtained a loan of 35*l.*, and being pressed for payment, obtained further time by giving as a security an I O U for 35*l.*, purporting to be signed by himself and his brother-in-law, George Wickham. It was a genuine instrument so far as regards his own signature, but the name of George Wickham was forged. I am of opinion that this was clearly a security for payment of money within the Act. It was said that there was no consideration for the giving of it. That is not so, for there was forbearance obtained from the creditor. And now that Lord Tenterden's Act is repealed, and there is no necessity for the consideration to appear on the face of the instrument, it would have operated at all events as a guarantee by Wickham for the payment of 35*l.* if his name had not been forged.

BYLES, J.—I am of the same opinion.

PICOTT, B.—I also think that this was a security by Wickham to pay the debt for the prisoner.

LUSH, J.—I think this was a security for the payment of money within the statute. Had this been the signature of Wickham he

(a) This section enacts that, "Whoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or chattels, or any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money, or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on, or assignment of any such accountable receipt with intent in any of the cases aforesaid to defraud, shall be guilty of felony."

would have been bound by it, and it would have been a good guarantee for the payment of 35*l.* by him, and if that is so, the instrument is a security for the payment of money within the Act.

HANNEN, J. concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

November 18, 1871.

Before KELLY, C.B., BYLES, J., PIGOTT, B., LUSH, J., and
HANNEN, J.

REG. v. STENSON AND HITCHMAN. (a)

False pretences and conspiracy—Evidence.

S. and H. were jointly indicted on counts for false pretences, and a general count for conspiracy. S. was convicted on the counts for false pretences, and both on the count for conspiracy.

The evidence was, that they were ostensibly carrying on business as publishers under the name of H. and Co., and that Hitchman was the author of a book published by them. To force the sale of the book, S. procured M. to write letters, purporting to come from a titled lady, ordering a copy of the book, and to address them to country booksellers. These letters were delivered by M. to S., and found their way by post to different country booksellers, and inclosed with them was a printed circular from the firm, offering reduced terms for an order of seven copies or more. At the trial, two witnesses produced a number of such letters, some of which had been given to them by booksellers (other than those named in the indictment) who received them, and some came to them from booksellers by post. There were no counts in the indictment alleging any intent to defraud by false pretences these particular booksellers, but the count for conspiracy charged generally a conspiracy to defraud A. B. and others. It was also proved that H., after the frauds charged, had represented himself as H. and Co.:

Held, that the letters were admissible in evidence, without calling the booksellers who actually received them.

Held, also, that evidence of attempts to defraud other booksellers than those named in the indictment was admissible under the count for conspiracy.

Held, also, that the representations of H., after the frauds charged, were admissible in evidence.

CASE reserved at the sessions of the peace for the county of Middlesex, on the 12th of September, 1871, by Mr. Serjeant Cox, the Deputy-assistant Judge.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The defendants were charged with obtaining money by false pretences, and also for a conspiracy to defraud.

The indictment contained nine counts.

The first count charged that the prisoners "did send to and caused to be received by one Charles Pope Chapple a certain manuscript letter or paper, on which was stamped, printed, and embossed, an earl's coronet, in coloured relief, and purporting to be written by a person rightfully using the title and designation of Lady Scott," and that the defendants "by so sending and causing it to be received, as aforesaid, the said letter," &c., did falsely pretend to the said Charles Pope Chapple that a lady of rank, lawfully bearing the name of Lady Scott, entitled by law to use and display a coronet, was then desirous to purchase a copy of a certain work called "Sunshine and Shadow," and then asked the said Charles Pope Chapple to procure for her a copy of the said work entitled, &c., in time for her return from town, and also that the said letter was a true and genuine letter of a lady of rank; and also that the order in the said letter contained was a true and genuine order for goods, to wit, for the said book, entitled, &c.; and also that a certain Lady Scott desired to become a customer of the said Charles Pope Chapple; and also that a certain Lady Scott had then recently gone from Ilminster to London, and was about to return from London to Ilminster, and then required to be purchased for her the said book entitled, &c., and upon her return would call at the shop of the said Charles Pope Chapple and pay for the said book, by means, &c., the said defendants did obtain from the said Charles Pope Chapple a certain valuable security, to wit, an order for the payment of the sum of 2*l.* 7*s.* 3*d.*, with intent, &c.

The second count charged a similar false pretence to R. W. Hetherington.

The third, fourth, fifth, sixth, seventh, and eighth counts charged the like false pretences to Alfred Lambert, Henry Bailly, James Ensor, William Morley, Thomas Weller, and Barnard Valentine.

The ninth count charged that on the 1st day of June, 1871, the said defendants, "together with others, whose names are to the jurors unknown, unlawfully did conspire, combine, confederate, and agree together, by divers false pretences and fraudulent and indirect means and devices, to obtain from and acquire to themselves the moneys of certain dealers in books, to wit, Charles Pope Chapple (and the seven other persons, named in the eight counts charging false pretences) and others, and to cheat and defraud the said dealers in books of their said moneys against the peace," &c.

The evidence for the prosecution was, that the defendants were carrying on business ostensibly as publishers, under the style of Hamilton and Co. The defendant Hitchman had published a book entitled "Sunshine and Shadow," of which he professed to be the writer, in the assumed name of the Viscount de Montgomery.

This book was published and sold at the publishing offices conducted by the defendants. For the purpose, as it was alleged, of procuring a sale for the book, they caused to be sent by post, to a great number of booksellers in the country, a letter purporting to be from one Lady Scott, stating that she (the writer) desired to purchase a copy of the work entitled "Sunshine and Shadow" (a prospectus of which was inclosed, containing extracts from numerous eulogistic criticisms), and requesting the bookseller to procure a copy of it for her, which she would call and pay for on her return from town. The prospectus inclosed with this letter stated that if a bookseller would order seven copies at once a larger discount would be allowed, and he might return unsold copies.

The effect of this letter was proved by some of the booksellers in question to have been that, believing it to be the genuine order of a Lady Scott, they had ordered the book through their usual London agents, who proved that they had procured the volumes from the defendant's office, paying for them there the wholesale price at which books are sold by publishers to booksellers; and one of the country booksellers (Chapple), induced by the offer in the prospectus of the seven copies at a larger discount, sent an order and a cheque for 2*l.* 7*s.* 3*d.* for seven copies, which were duly forwarded to him by the defendants.

It was proved that all of these letters purporting to be from Lady Scott were written by a lady named Maniate, whose evidence was as follows: "I am a teacher of languages at Brompton. I answered an advertisement in the *Times* for a lady wanted to copy letters. The defendant Stenson called on me. He brought a quantity of note paper with a coronet upon it, and the form of a letter which I was to write. It was the Lady Scott. (Letter now produced.) I wrote a great number of them, and gave them to the defendant. He also brought me some envelopes and a directory containing the names of country booksellers, and directed me to address the envelopes to them. I did so, and gave them to the defendant. All the letters and envelopes before me (those produced by the booksellers named in the indictment, as also those produced by Abraham Gould and by Mr. Miles) are in my handwriting, and were some of those I wrote by the direction of Stenson and gave to him."

There was no evidence to connect the defendant Hitchman with this proceeding of Stenson.

There was no direct evidence that the letters were sent out by the defendants or one of them. They were not proved to have made them up or to have posted them. The jury were asked to infer that they did so from the fact proved that they were written and addressed by Mrs. Maniate by direction of one of the defendants (Stenson), who was proved to be ostensibly carrying on, with the other defendant, Hitchman, the business of Hamilton and Co., at whose offices the book ordered by the supposed Lady Scott was published.

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Evidence.*

There was no evidence to prove that the letters were not sent by a Lady Scott, but the jury were asked to infer the non-existence of any Lady Scott entitled to use a countess's coronet, from the evidence of Mr. George Harrison, a Windsor herald, who proved that he was acquainted with the crests of the nobility; that the crest on the letters produced was a countess's coronet; that there were several persons named Lady Scott, but none of them was a countess, or entitled to use the crest upon the letters.

The existing persons named Lady Scott were not called.

It was contended for the prosecution that it might be inferred from the fact that Mrs. Maniate had written all the letters and addressed all the envelopes for defendant Stenson, that they were not sent out by any Lady Scott, but by the defendants, or one of them; and further, that this might also be inferred from the printed prospectus of the book having been enclosed with the letters.

The object of this false pretence was alleged to be to induce the country booksellers to order the book, whereby the defendants obtained a sale, and consequently the money, for a book that would not have been bought by the booksellers but for the false pretence contained in the Lady Scott letter.

In the course of the trial the following questions were raised:

First, the booksellers named in the indictment were called to prove the receipt by them of, and to produce the Lady Scott letter received by them through the post.

Then Abraham Gould said: "I am an advertising agent. I knew Hitchman eleven years ago as Montgomery. Knew Stenson at the latter part of last year. I went about to collect evidence for this prosecution. I produce five letters which I received from booksellers in different towns. Three of them were given to me by themselves when I called upon them, and two came to me by post."

Cross-examined:—"I will not be quite positive how many came by post, or how many were given to me by the booksellers. They told me when they gave them to me that they had received them by post." (Question objected to.)

These letters were copies of the Lady Scott letter, and were identified by Mrs. Maniate as having been written and addressed by her for the defendant Stenson.

They were addressed to other booksellers than those named in the indictment, and were put in by the prosecution under the count charging a conspiring to defraud the booksellers there named "and others."

It was objected for the defendants:—First, that a false pretence that formed part of the charge could not be proved by the mere production of letters by a witness who had received them from the parties; secondly, that the evidence must be limited to the charges of false pretences made to the persons named in the indictment.

I so held.

It was then contended for the prosecution that under the ninth count (for conspiring to defraud the said booksellers and others) it was competent to the prosecution to prove similar frauds on other booksellers than those named in the indictment.

It was replied for the defendants, that even if this were so, letters alleged to have been received from booksellers in the country by the witness personally, or coming to him by post, are not admissible on mere production by the recipient, and that they could be made evidence only by calling the booksellers themselves to prove how and when they had come to them.

I was of opinion that the letters so produced were inadmissible both to prove the counts for false pretences and the count for conspiracy, but counsel for the prosecution strongly urging that if the evidence was wrongly rejected there would be a miscarriage of justice without redress, while the defendants would have a remedy if the prosecution was wrong, I consented to receive them, and reserved the point.

Secondly. Later in the course of the trial, counsel for the prosecution proposed to put in evidence as proof of conspiracy, under the ninth count, certain acts of the defendant Hitchman, done after the date of the offence. It was objected on the part of the defendants, that acts done after the alleged fraud was completed, could not be admissible evidence of a conspiracy to commit that fraud. I admitted the evidence, reserving this point also for the consideration of the Court.

Witnesses were then called to prove that defendant Hitchman, after the date of the frauds charged in the indictment, had called himself by the name of Hamilton, and represented himself as of the firm of Hamilton and Co.

Thirdly. Subsequently Mr. Miles, a partner in the firm of Hamilton, Adams, and Co., publishers, having their place of business near to that of the defendants, produced a quantity of letters which he stated had come to the office of Hamilton, Adams, and Co., by mistake for Hamilton and Co.

Mrs. Maniate was recalled, to prove that all the letters and envelopes so produced by Mr. Miles were some of those she had written by direction of defendant Stenson. It appeared that they were not addressed to the booksellers named in the indictment.

On the part of the defendants, it was objected that they could not be received, first, as the evidence must be limited to the specific charges in the indictment; and, secondly, as there was no sufficient evidence that these letters had ever been sent to or received by the persons to whom they were alleged to be addressed.

For the prosecution, it was contended that they were admissible under the count for conspiracy, charging the attempt to defraud the booksellers named "and others;" and that one of the defendants having directed them to be written made them evidence, without further proof of whence they came.

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I reserved this point also for the opinion of this Court.

I withdrew from the jury the case as against Hitchman on the first eight counts of the indictment (charging false pretences), but I left to them the question as to him (Hitchman) on the count for conspiracy, and as to the defendant Stenson on all the counts.

The jury found the defendant Hitchman guilty on the count for conspiracy only, and the defendant Stenson guilty on all the counts except the first.

Sentence was deferred, and the prisoners remain in custody.

The opinion of the Court is requested on the three points above stated; first, if in all or either of them the evidence was wrongly admitted; secondly, if so, whether such wrongful admission invalidates the conviction, first of Stenson under the counts for false pretences, and second of both the defendants under the count for conspiracy.

EDWARD WM. COX,
Deputy-Assistant Judge.

Montagu Williams for the prisoner Stenson.—The letters produced by Gould and Miles were inadmissible, without calling the country booksellers to whom they were addressed, to show in what state and under what circumstances they received them. [LUSH, J.—Maniate wrote the letters and addressed them, and then gave them to Stenson; and then they are found in different country towns. He gave her a directory to copy the names and addresses of country booksellers. If the letters had been altered, Maniate might have been questioned upon that. It was for you to show it, if anything else had been put into the letters. KELLY, C.B.—The simple question is, whether Stenson sent the letters? It is possible that some one else may have done so. PIGOTT, B.—You might have shown how Stenson got rid of them. LUSH, J.—The letters were last traced to his hands, and it is a fair inference that he sent them.] There was no evidence who sent them or who received them.

Straight (H. Browne with him) for Hitchman.—The statements by Hitchman, made after the frauds charged, that he represented the firm of Hamilton and Co., were not admissible to connect him with the frauds or the conspiracy. [KELLY, C.B.—Is it possible to imagine that the partner most deeply interested in the book could be ignorant of the proceedings taken by the other partner to sell and get rid of the book? LUSH, J.—The statement in the case, “that the defendants were ostensibly carrying on business as partners under the style and firm of Hamilton and Co., and that Hitchman had published the book of which he professed to be the writer,” shows a previous connection between the prisoners.]

Besley, for the prosecution, was not called upon.

KELLY, C.B.—In this case, which is a peculiar one, there are only two questions substantially. The first is, whether the letters produced by Gould and Miles were admissible in evidence? It

appears that the prisoner Stenson induced the witness Maniate to write a number of fabricated letters, purporting to be written by a Lady Scott, ordering one copy of a book called "Sunshine and Shadow." The letters were in such terms as to indicate that the book was a work of great merit, and to induce persons to purchase it. A number of these letters, and also envelopes addressed to country booksellers, were written by her, and the whole of them were delivered over to Stenson. The evidence was, that these letters were received by the country booksellers through the post. The letters, together with a circular, stating that, if a bookseller would order seven copies at once a larger discount would be allowed, emanating from the defendant's establishment, carried on under the name of Hamilton and Co., found their way into the hands of the country booksellers. A witness, Gould, produced five of such letters. Some were given to him by the booksellers to whom they were addressed by Maniate, and some he received by post from booksellers in different towns. Upon this the question was raised, whether the letters were admissible in evidence, without calling the booksellers themselves. I am of opinion that they were admissible in evidence as soon as the foundation was laid that a number of similar letters were written by Maniate for Stenson and placed in his hands, and evidence was given that they had been transmitted to country booksellers by post. We come then to the charge of conspiracy. Surely there was evidence of an intention to defraud the trade in general. In addition to those letters, there was evidence that a number of others produced by the witness Miles were prepared at Stenson's instance and delivered to him by Maniate, and that they somehow or other had got into circulation. This was evidence against him on the count for conspiracy. The next question is, whether these letters were evidence against the other prisoner, Hitchman? He was a partner in the establishment carried on by him and Stenson, and he was the author of the work which it was the object of these fabricated letters to circulate and to sell. I therefore think the letters were some evidence against him on these counts. As soon as evidence was given that a conspiracy had been the means of these letters coming into existence, any evidence which would connect the other prisoner Hitchman with the general intent and objects of a conspiracy was evidence against him. And then arose the second question, viz., whether declarations by the prisoner Hitchman, after the date of the frauds charged, that he had called himself by the name of Hamilton, and represented himself as Hamilton and Co., were admissible against him? There can be no doubt that anything done at any time, even as late as the day before the trial, which shows that a person had been at a former time a party to a conspiracy, is admissible in evidence against such person. Here not only were the declarations made by him, but it was shown that he had the strongest motives as a member of the firm and the author of the work, to sell and circulate it, and therefore they were admissible against him on the count for

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conspiracy. Both on the counts for false pretences, as well as on that for conspiracy, I think the evidence was admissible, and that the conviction must be affirmed.

BYLES, J.—I also think that the conviction should be affirmed.

PIGOTT, B.—I am of the same opinion. The evidence was clearly admissible, it is sufficient to say, upon the count for conspiracy, but I also think it was admissible upon the charge of false pretences. The letters were written by order of Stenson, and delivered to him, and found their way into the hands of country booksellers. It is a fair inference to draw that Stenson sent them to the booksellers. As to the declarations of Hitchman, after the frauds charged in the indictment, I cannot see any doubt that they were evidence to connect him with what he did before. They clearly connect him with the conspiracy.

LUSH and HANNEN, JJ., concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 27, 1872.

(Before COCKBURN, C.J., KELLY, C.B., MARTIN, B., WILLES, J., BRAMWELL, B., CHANNELL, B., BYLES, J., KEATING, J., BLACKBURN, J., MELLOR, J., LUSH, J., PIGOTT, B., BRETT, J., CLEASBY, B., GROVE, J., and QUAIN, J.)

REG. v. PAYNE. (a)

Evidence—Joint charge—Incompetency of fellow prisoners as witnesses for one another.

After several prisoners, jointly indicted, are given in charge to the jury one whilst in such charge cannot be called as a witness for another.

The 14 & 15 Vict. c. 99, does not apply to criminal proceedings.

CASE reserved by Keating, J., for the opinion of the Court for the Consideration of Crown Cases, and directed by that Court to be argued before all the judges.

John Payne, George Owen, Isaac Owen, and Joseph Curtis, were indicted before me, at the winter assizes, for the county of Worcester, 1871, for that they, to the number of three or more, armed with offensive weapons, by night did enter and were on land, belonging to Earl Dudley, for the purpose of taking or destroying game.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

It appeared that at one o'clock on the morning of the 4th of October, 1871, the keepers of Earl Dudley discovered a number of poachers upon the Earl's lands taking game. They were armed with stones, bludgeons, &c., and advanced upon the keepers with whom they had a desperate struggle; ultimately, the keepers were forced to retire, one keeper being dangerously and another severely wounded.

The prisoner Payne and the two Owens were first apprehended, and, on being brought before the magistrates, each set up an *alibi* by way of defence, and called witnesses in support; amongst the witnesses called by Payne was the prisoner Curtis (not then in custody), and he proved having been with Payne, at the time in question, at a place so distant from the scene of the affray as to render it impossible he could have been one of the poachers. Curtis with the other witnesses for the prisoners were bound over by the magistrates under 30 & 31 Vict. c. 35, but, having been afterwards identified as one of the party of poachers, he was committed and indicted with the other three prisoners.

On the trial all four prisoners were sworn to by various witnesses as having formed part of the gang of poachers on the night in question; the defence by each was, as before the magistrates, an *alibi*, and the counsel for Payne proposed to call the prisoner Curtis to prove what he had deposed to before the justices. I held that he was incompetent and could not be called. All the prisoners were convicted and sentence passed.

I desire the opinion of the Court of Crown Cases Reserved.

First, whether a prisoner, jointly indicted with another, can, after they have been given in charge to the jury, be called as a witness for the other without having been either acquitted or convicted or a *nolle prosequi* entered? *Winsor v. The Queen* (35 L. S. M. C. 161), *Reg. v. Deeley* (11 Cox C. C. 607).

Secondly. Whether, upon the present form of indictment and under the circumstances of the case, the prisoner Curtis was competent and ought to have been called as a witness for the prisoner Payne? (See Russell on Crimes, by Greaves, 626-7, 4th edit.; Taylor on Evidence, 1178-9.)

If the prisoner Curtis was a competent witness and might have been called on behalf of Payne in the present case then the conviction is to be quashed or the prisoner to be discharged, otherwise, the judgment is to stand.

H. S. KEATING.

T. S. Pritchard (*E. H. Selfe* with him) for the prisoner.—The question mainly depends on the construction of the 14 & 15 Vict. c. 99, s. 3. Sect. 1 of that Act repeals so much of the 6 & 7 Vict. c. 85 as provides that that Act shall not render competent any party to any suit, action, or proceeding, individually named in the record, &c.; then sect. 2 enacts that on the trial of any issue joined, or of any matter or question, or on an inquiry arising in any suit, action, or other proceeding in any court of

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justice, &c., the parties thereto and the persons in whose behalf any such suit, action, or other proceeding may be brought or defended, shall, except as hereinafter excepted, be compelled and compellable to give evidence. And then sect. 3 provides that nothing herein contained shall render any person, who, in any criminal proceeding, is charged with the commission of any indictable offence or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or shall render any person compellable to answer any question tending to criminate himself or herself, or shall, in any criminal proceeding, render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband. Now, under the 1st section, the prisoner Curtis was a competent witness for the prisoner Payne, and there is nothing in the 3rd section which prevents him from being a witness. Since that Act, in *Reg. v. Deeley* (11 Cox C. C. 607), where three prisoners were jointly indicted for robbery with violence, and were given in charge to the jury, Mellor, J., allowed two of the prisoners to be called as witnesses for the other one. And in a case at the Shropshire Assizes, Pigott, B., also allowed one prisoner to be called as a witness for another, on a joint indictment, after they were given in charge to the jury. The same course has also been followed by Lush, J. The reason for the incompetency was the ground of interest and not of being a party to the suit or proceeding (1 Phil. on Ev. 68, 8th edit.) In *Worrall v. Jones* (7 Bing. 395), Tindal, C.J., says that a party to the record would be an admissible witness if he were not interested. [MARTIN, B.—Suppose two persons jointly indicted for murder, what legal interest has one in the conviction or acquittal of the other? Was not the rule that parties to the proceeding were excluded? BRAMWELL, B.—If it was on the ground of interest, that was an objection for the benefit of the party interested which might be waived and the party called, but did anyone ever hear of such a thing being done?] It may be that the rule is qualified to the extent that a party to the immediate inquiry is not admissible. [BLACKBURN, J.—If a prisoner is competent to give evidence for a fellow prisoner, on cross-examination he may be forced to give evidence against himself.] He would be privileged from answering questions tending to criminate himself. In Taylor on Evidence it is said that the 14 & 15 Vict. c. 99, which was intended to remove a doubt, has, instead, created one by the words “except as hereinafter is excepted” in sect. 2. [BRAMWELL, B.—My brother, Cleasby, B., suggests that that exception points to sect. 4. Is not the rule of construction that where the Crown is not referred to in Acts of Parliament they do not apply to the Crown, applicable here, for the Crown is the prosecutor? COCKBURN, C.J.—The words “other proceeding” in the statute must be construed as *eiusdem generis* with the words preceding “suit, action,” and

would mean other civil proceeding. The exception in the proviso was introduced (probably in committee) *ex abundante cautela*, and was not intended to enlarge the enactment.] The words of sect. 2 are every "suit, action, or other proceeding in any court of justice or before any person," &c., and then sect. 3 goes beyond civil proceedings. The learned counsel then referred to 1 Rus. on Crimes, 625. In *Reg. v. Smith* (1 Mood. C. C. 289) the wife of one prisoner was held inadmissible to prove an *alibi* for another prisoner, with whom her husband was jointly indicted, on the ground that, by shaking the evidence of a witness who had identified both prisoners, she would weaken the case against her husband; but in *Reg. v. Moore* (1 Cox C. C. 59), Maule, J., said of course a wife could not be examined for her husband, but for another prisoner jointly indicted with him for a burglary she might, and admitted her as a witness. And Wightman, J., so held in *Reg. v. Bartlett* (1 Cox C. C. 105). The modern legislation encourages the calling of witnesses for prisoners; and, to facilitate this, the 30 & 31 Vict. c. 35, s. 3, provides for their being bound over, and sect. 5 for the allowance of their expenses. It would be a dangerous rule to exclude a co-prisoner, as their witnesses' mouths might be shut by vindictive persons procuring their committal as accomplices. [COCKBURN, C.J.—This danger may be obviated by asking permission to have the prisoners tried separately, and then there would be no objection to calling one prisoner as a witness for another with whom he was jointly indicted.] It ought to be a matter of right for a prisoner to be enabled to call a joint co-prisoner as a witness. The giving of the prisoners in charge ought not to raise any difficulty, for the issue is joined when the prisoners plead: (*Reg. v. Winsor*, 35 L. J. M. C. 121; 10 Cox C. C. 276.) [BLACKBURN, J.—The material thing is, when the prisoners are given in charge to a jury, who are to say whether they are guilty or not guilty? They are the persons who are to determine the issue as well as to hear the evidence; if one prisoner is admissible for another he must also be admissible against him.] The competency of one prisoner as a witness for another is one thing, the privilege not to answer questions tending to criminate himself is another; the refusal to answer only goes to the credit of the witness. Taylor on Evidence 627 (note) and *Reg. v. Jackson and Cracknell* (6 Cox C. C. 525) were then referred to.

Streeten (Jelf with him) for the prosecution.—The witness was properly rejected. In *Hawksworth v. Showler* (12 M. & W. 47) Lord Abinger said: "Nothing is clearer than this; that a person cannot be a witness who is a party to the record and affected by the determination of the issue, and that the wife of such a person is equally incapable of being a witness." And Alderson, B., said: "The rule is that a party upon the record, against whom the jury have to pronounce a verdict, cannot be a witness before that verdict is pronounced." The modern statutes have not altered that principle. The 14 & 15 Vict. c. 99, only applies to civil pro-

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ceedings, and sect. 3 was introduced lest it should otherwise be thought to extend to criminal proceedings. If Curtis had been allowed to be called as a witness, every word that he said must have been in his own favour as well as in favour of Payne. If a co-prisoner is admissible at all, his fellow prisoner, or the prosecutor, may compel him to be a witness. [LUSH, J.—If he was allowed to be called he must be cross-examined; and if he declines to answer on the ground that his answers would tend to criminate him, that might have the effect of leading to his conviction. COCKBURN, C.J.—Or he might be cross-examined as to his past life, and the result might seriously injure his case. BRETT, J.—Is it not a fundamental rule of the law of England that when a prisoner is on his trial he shall not be examined or cross-examined for or against himself?]

Pritchard, in reply, cited *Reg. v. Stewart* (1 Cox C. C. 174).

COCKBURN, C.J.—We are all of opinion that the witness was properly rejected at the trial, and we all agree that the proviso in the 14 & 15 Vict. c. 99, on which the prisoner's counsel relied, was only intended to prevent the statute being supposed to contradict or alter the rule of law as it has existed from the earliest times, according to which rule a party on his trial could not be examined or cross-examined as a witness for or against himself. It is impossible that the Legislative could have intended by such a proviso to do so, and the old law of England, in that respect, still remains unaltered.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 30, 1872.

(Before COCKBURN, C.J., KELLY, C.B., MARTIN, B., WILLES, J., BRAMWELL, B., CHANNELL, B., BYLES, J., BLACKBURN, J., LUSH, J., PIGOTT, B., MELLOR, J., BRETT, J., CLEASBY, B., GROVE, J., and QUAIN, J.)

REG. v. WARD. (a)

Unlawful wounding—Verdict of—14 & 15 Vict. c. 19, s. 5.

To support a verdict of guilty of unlawfully wounding, under the 14 & 15 Vict. c. 19, s. 5, the act must be done maliciously as well as unlawfully.

Prisoner, who was jealous of persons going in pursuit of wildfowl, fired, while the prosecutor was on the water in his punt in pursuit of wild fowl about twenty-five yards off, to frighten and deter him from again coming into the creek for the purpose of fowling. As the prosecutor slewed his punt round he was struck by the shots from the prisoner's gun; but if he had not slewed the boat round the shot would not have struck him.

Held, that conviction of the prisoner for unlawfully and maliciously wounding the prosecutor under sect. 5 of 14 & 15 Vict. c. 99, was supported by the evidence.

CASE reserved for the opinion of the Court for the Consideration of Crown Cases by Cockburn, C.J., and directed by that Court to be argued before all the Judges.

The prisoner was tried before me at the last assizes for the county of Suffolk, on a charge of unlawfully, maliciously, and feloniously wounding one William Job Chatten with intent to do him grievous bodily harm.

The prosecutor, Chatten, and the prisoner were both fishermen, living at Aldebury, in Suffolk, and both were in the habit of going out in punts to shoot wildfowl in a creek of the river Alde.

The manner of using a punt for the purpose of shooting wildfowl is that the gunner lies with his face downwards in the boat, extending his arms over the sides, and propelling the boat by means of a pair of short paddles, so as to avoid, as much as possible, being seen by the birds on the water.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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On the evening of the 30th of January, 1871, the prosecutor, Chatten, was on the water in his punt in pursuit of wildfowl. Having been out some time and finding no birds about he determined to return; and, having put his arm out, was using the paddle to slew the punt round for that purpose, when he suddenly heard the report of a gun, and at the same time found himself struck by several shots in the left arm and eye, the effect of which was seriously to injure his arm, and so to damage his eye as to render its total extraction necessary a few days after.

There was no doubt that the shot, by which the prosecutor was injured, was fired by the prisoner. On the prosecutor calling out on being struck, and asking who had fired the shot, the prisoner, who was in his punt about twenty-five yards off, came forward and said he had fired it, adding that if Chatten had not turned his boat round as he, prisoner, was in the act of firing, the shot would not have struck him; this being so, the question in the case was under what circumstances and with what intent prisoner had fired off the gun.

It was proved that the night was light, so that birds, and, *à fortiori*, a punt on the water could have been plainly seen at a distance of fifty to sixty yards; and it was positively sworn by the prosecutor that there were no birds about on that evening, certainly none in the neighbourhood of his boat. It was plain, therefore, that the prisoner had not fired for the purpose of killing wildfowl.

Evidence was given from which it appeared that the prisoner was extremely jealous of persons going in pursuit of wildfowl on the water where the event took place, and had, on different occasions, used threatening language to the effect that he should shoot at birds if occasion offered, notwithstanding other persons might be between him and them; and it was suggested by the prosecution that the prisoner had intentionally shot at the prosecutor with the intent to injure him and thereby prevent his pursuing wildfowl on the water in question in future.

On the other hand it appeared that the prosecutor and the prisoner had always been on good terms, having formerly been shipmates on board the same pilot vessel.

It was admitted by the prosecutor that, on his calling out, the prisoner at once came forward and ascribed the fact of the shot having taken effect to the sudden change of the position of the prosecutor's boat, a change of position which was an admitted fact, and assured the prosecutor that the result was purely accidental.

It appeared that the prisoner had towed the prosecutor's punt into the harbour and rendered him every assistance in getting on shore. The prisoner received an excellent character for good conduct and humanity.

Under these circumstances it seemed to be more probable that the prisoner shot off his gun in the direction of the prosecutor's boat with the intention of frightening him, and so deterring him

from again coming into the creek for the purpose of fowling, rather than that he shot with the intent of doing him bodily harm.

While, therefore, I left the question, of the intent charged in the indictment, to the jury, I directed them that if they took the more favourable view of the case, they should find the prisoner guilty of unlawfully wounding.

This they accordingly did.

But thinking it deserving of consideration whether a wounding occasioned by an act done without any actual malice or intention of offering violence to the prosecutor, would be sufficient to constitute an "unlawful wounding" within the meaning of the statute 14 & 15 Vict. c. 19, s. 5, I reserved that question for the consideration of this Court, and request their judgment thereupon.

The prisoner was admitted to bail to come up for judgment at the next assizes for the county of Suffolk, if necessary.

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Metcalf for the prisoner.—The indictment is framed upon the 24 & 25 Vict. c. 100, s. 18, which enacts (*inter alia*) that whosoever shall unlawfully and maliciously, by any means whatsoever, wound any person with intent to do grievous bodily harm, shall be guilty of felony. The jury acquitted the prisoner of the felony, and found him guilty of unlawfully wounding under the 14 & 15 Vict. c. 19, s. 5. The first question is, what is the meaning of "unlawfully wounding?" Must it be done maliciously? It is submitted that it must. Sect. 4 of the 14 & 15 Vict. c. 19, now repealed by 24 & 25 Vict. c. 95, after reciting that it was expedient to make further provision for the punishment of aggravated assaults, enacted that if any person shall (*inter alia*) unlawfully and maliciously cut, stab, or wound any person, he shall be guilty of a misdemeanour, and liable to be imprisoned, with or without hard labour, for any term not exceeding three years. Sect. 5 enacts that if upon the trial of any indictment for any felony (except murder or manslaughter) where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged, then the jury may acquit the defendant of the felony and find him guilty of unlawfully cutting, stabbing, or wounding, and, thereupon, such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanour of cutting, stabbing, or wounding. The misdemeanour of cutting, stabbing, or wounding, was provided for by sect. 4, and that was an unlawful and malicious wounding. The verdict, under sect. 5, must be of an unlawful wounding, and the only enactment relating to unlawfully wounding was sect. 4. [BLACKBURN, J.—I think that must be so. The dropping of the word "maliciously" in sect. 5 makes no difference.] Then, to support the finding of the jury in this case,

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there must be evidence of actual or implied malice, but there is none. The prisoner had no intention to hit the prosecutor, but only to frighten him. [LUSH, J.—What the prisoner did, did he not do from a bad motive—to frighten him off the ground? Is not that malice? KELLY, C.B.—Does maliciously mean intentionally?] It is unlawful to fire across a highway; but suppose a person on his own land sees a hare running along the adjoining highway, and, seeing no person, fires at it and happens to hit a person coming along the highway, that, though an unlawful act, would not be malicious. [COCKBURN, C.J.—The prosecutor would not have been hit if the boat had not slewed round.] Suppose some boys were to make a bonfire in a field, a short distance from a rick of hay, which would be an unlawful act, and the wind were to carry the sparks away and set fire to the hayrick and destroy it, that would not be a malicious act. The case of *Reg. v. Child* (12 Cox C. C. 64; L. Rep. 1 C. C. R. 307) was then cited. In *McPherson v. Daniels* (10 B. & C. 272) Littledale, J., defined malice “a wrongful act done intentionally without just cause or excuse.” The wrongful act here charged is the wounding. [PIGOTT, B.—I should say the wrongful act was the firing off the gun close to the man’s ear.] In *Reg. v. Noon* (6 Cox C. C. 139) Cresswell, J., said: “If the prisoner used the sword intending to do a serious injury, that is such evidence of malice as the law holds to be murder.” So in *Reg. v. Sparrow* (8 Cox C. C. 393; Bell C. C. 298) there was evidence of intention to support a count for maliciously inflicting grievous bodily harm. [MELLOR, J.—The prisoner did an unlawful act *malò animò* to drive the prosecutor off the ground, which he had no right to do. In Foster’s Crown Law, sect. 2, malice is defined as the offspring of a wicked, perverse, and incorrigible disposition. KELLY, C.B.—Intentional is applicable to the act done.] Here the prisoner’s intention was to frighten, but not to hit, the prosecutor.

No counsel appeared for the prosecution.

The Judges retired to consider their decision.

COCKBURN, C.J., on their return into court, said: We have considered this case, and are all agreed that in construing sect. 5 of the 14 & 15 Vict. c. 99, it should be read as though the word “maliciously” were introduced into it. It is an essential element of a conviction under that section, that the act done should have been done maliciously as well as unlawfully. With regard to the question whether, in this case, the facts stated amount to proof of malice or not, there is a difference of opinion among the members of the court, twelve out of the fifteen judges are of opinion that there was proof of malice, and that the conviction was right.

Conviction affirmed.

SOUTH WALES CIRCUIT.

GLAMORGANSHIRE WINTER ASSIZES, 1871.

Cardiff, December.

(Before LUSH, J.)

REG. v. JAMES AND ANOTHER.(a)

*False pretences—Indictment—Omission of words “with intent to defraud”—Amendment.**Where in an indictment for false pretences the words “with intent to defraud” are omitted, the indictment is bad and cannot be amended under the 14 & 15 Vict. c. 100, s. 1.*

WILLIAM JAMES and LEMUEL HARRIS were indicted for obtaining money by false pretences from one Solomon Blaiberg, in the month of September, 1871.

The indictment, omitting the formal parts of it, was as follows :
 William James and Lemuel Harris on the, &c., unlawfully, knowingly, and designedly, did falsely pretend to one Solomon Blaiberg, that a certain order for the payment of the sum of 2*l.*, to wit, a post-office order for the payment of the sum of 2*l.* had been sent by his, the said Lemuel Harris's sister's husband from America to the said Lemuel Harris's sister, and that she, the said Lemuel Harris's sister, was the lawful payee of the said order, and that the signature, Ann Webber, which was subscribed to the said order was the signature of his, the said Lemuel Harris's sister, as such lawful payee of the said order as aforesaid, and that she, the said Lemuel Harris's sister, being such lawful payee as aforesaid, had sent him, the said Lemuel Harris, to get the said order cashed, by means of which said false pretence they, the said William James and Lemuel Harris, did then unlawfully obtain from the said Solomon Blaiberg the sum of 1*l.* 17*s.* 6*d.*; whereas in truth and in fact the said order for the payment of the said sum of 2*l.*, to wit, the said post-office order for the payment of the sum of 2*l.* had not been sent by his, the said Lemuel Harris's sister's husband, from America or elsewhere to the said Lemuel Harris's sister, the lawful payee of the said order; nor was the signature, Ann Webber, which was subscribed to the said

(a) Reported by E. JULYAN DUNN, Esq., Barrister-at-Law.

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order the signature of his, the said Lemuel Harris's sister, as such lawful payee of the said order as aforesaid, nor had she, the said Lemuel Harris's sister, being such lawful payee as aforesaid, sent him, the said Lemuel Harris, to get the said order cashed, as they, the said William James and Lemuel Harris, well knew at the time when they did so falsely pretend as aforesaid, against the form of the statute in that case, &c., &c.

O. E. Coleridge and *Arthur J. Williams* were for the prosecution.

J. W. Bowen appeared for James, and *B. Francis Williams* for Harris.

The facts of the case were shortly as follows :—

A certain Susannah Webber had been expecting some money from America from her husband who was out there. She had previously received money from him by post-office orders. Evidence was given showing that the husband had sent an order to his wife for 2*l.*, but it had never been received by her. A short time after the date when the letter should have come into the hands of Mrs. Webber, one of the prisoners had asked Solomon Blaiberg to cash an order for him, saying that it was for a friend who wanted the money then, and could not get it, as the post-office was shut up. It being stated that the order was for Lemuel Harris's sister, who was ill at home and could not come herself, and Blaiberg believing the story told him by the prisoners (having had satisfactory transactions with one of the prisoners before), gave them the sum of 1*l.* 17*s.* 6*d.* for the post-office order for 2*l.* The order when presented at the money order office was found to be signed "Ann Webber," which was not the name of the payee that this order should be payable to, and the various allegations of the indictment being also proved, the case for the prosecution closed. Counsel for the defence calling no witnesses, the learned Judge pointed out that there was no allegation in the indictment of an intent to defraud.

Coleridge submitted that the indictment was good as it stood, as the intent might be inferred from the general words in the indictment, and that it was not necessary to follow the precise words of the statute in every instance, and the statute expressly stated that it was not necessary to allege an intent to defraud any particular person. *Reg. v. Williams* (7 C. & P. 554), and *Reg. v. Hamilton* (9 Q. B. 271) were cited.

LUSH, J.—I must hold the words "with intent to defraud" to be a material part of the indictment, nor can I amend it under the 14 & 15 Vict. c. 100, s. 1, and as the words are not inserted, their omission is, I think, fatal to the prosecution, therefore this indictment must be quashed.

Indictment quashed.

COURT OF CRIMINAL APPEAL.

Saturday, Jan. 20, 1872.

(Before COCKBURN, C.J., MARTIN, B., and CHANNELL, B.,
KEATING, J., and LUSH, J.)

REG. v. THOMAS BAILEY. (a)

*Larceny of Writ—County Court Warrant—24 & 25 Vict.
c. 96, s. 30.*

A judgment debtor whose goods had been levied upon, and were in possession of a County Court bailiff, under an execution, forcibly took the warrant from the bailiff and turned him out of possession, in the belief that it was the actual possession of the warrant alone which entitled the bailiff to remain in possession.

Held, that such taking away of the warrant was for a fraudulent purpose, and a felony within the 24 & 25 Vict. c. 96, s. 30, but not a larceny.

CASE reserved for the opinion of this Court by Lush, J.

The prisoner was indicted before me at Oxford, at the last Summer Assizes, under the 30th section of the Larceny Act (24 & 25 Vict. c. 96), which enacts that "whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole, or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever, of or belonging to any court of record, or relating to any matter civil or criminal, begun, depending, or terminated in any such court, &c., shall be guilty of felony."

The first count of the indictment charged the prisoner with stealing certain process of a court of record, to wit, a certain warrant of execution issued out of the County Court of Berkshire, in an action wherein one Arthur was plaintiff and the prisoner defendant. Also another warrant of execution out of the same Court, in an action Halcombe and Co. against the prisoner.

The second count stated that at the time of committing the offence hereinafter mentioned, one Brooker had the lawful custody

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of a certain process of a court of record, to wit, a warrant of execution out of the County Court of Berkshire in an action between Arthur and the defendant; that defendant, intending to prevent the due course of law, and to deprive Arthur of the rights, benefits, and advantages from the lawful execution of the warrant, did take from Brooker the said warrant, he (Brooker) having then the lawful custody of it.

It was proved that two actions had been brought in the County Court against the prisoner, in each of which judgment had been given against him, and a warrant of execution issued against his goods. The high bailiff of the court made the levy under these warrants, and, having done so, he handed the warrants over to his deputy bailiff, and left him in possession of the goods.

The prisoner, a day or two afterwards, forcibly took the warrants out of the bailiff's hands and kept them. He then ordered him away, as having no authority to remain there any longer, and, on his refusal to go, forcibly turned him out.

The prisoner was convicted; but, as I entertained a doubt whether these facts supported the count for larceny, and whether, as the prisoner's intention in taking the warrants was not to make use of them, but merely to deprive the bailiff, as he supposed, of his authority, and as the validity of the execution was not affected by his taking the warrants, he was guilty of taking them for a fraudulent purpose within the meaning of the statute, I forbore to pass sentence, and admitted the prisoner to bail till the opinion of this Court should have been taken upon the above points.

ROBERT LUSH.

No counsel appeared to argue on either side.

COCKBURN, C.J.—I think that the first count of the indictment which charges larceny will not hold. The facts are these; the prisoner had evidently conceived the notion that it was the possession of the warrant which made the possession of his goods by the bailiff lawful; and that if he could get the warrant away he could denude him of that authority, and the bailiff might be turned out of possession. Under that belief the prisoner forcibly took the warrants out of the bailiff's hands. That was not a taking *lucri causâ*, but for the purpose of preventing the bailiff from having lawful possession. Neither was the taking *animo furandi*. I may illustrate it by the case of a man, who, wishing to strike another person, sees him coming along with a stick in his hand, takes the stick out of his hand, and strikes him with it. That would be an assault, but not a felonious taking of the stick. There is, however, a second count in the indictment which charges in effect that the prisoner took the warrants for a fraudulent purpose. The facts show that the taking was for a fraudulent purpose. He took the warrants forcibly from the bailiff in order that he might turn him out of possession. That was a fraud against the execution creditor, and was also contrary

to the law. I am therefore of opinion that it amounts to a fraudulent purpose within the enactment, and that the conviction must be affirmed.

LUSH, J.—I am of the same opinion. I had a doubt whether or not the taking of the warrant by the prisoner, with the intention of making use of it for his own purpose, was a taking for a fraudulent purpose within the statute, but I am now clear upon the point, and agree with the rest of the Court.

The rest of the Court concurring,

Conviction affirmed.

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MIDDLESEX SESSIONS.

August 7, 1871.

(Before Mr. SERJEANT COX.)

REG. v. HILDITCH AND OTHERS.

The prisoner was indicted with others for stealing, and also for receiving from the other prisoners, knowing them to be stolen, four bags of rags.

On his apprehension the prisoner was searched and in his pocket was found a letter addressed to him, containing some references to the transaction, which letter was asserted by his counsel to be in the handwriting of his wife.

It was objected that, if this letter was written by the prisoner's wife, its contents could not be read in evidence against him, inasmuch as a wife cannot be a witness against her husband.

The contents of the letter were admitted, but with an intimation that a case would be reserved upon it.

PRISONER and four others were indicted for larceny and receiving of four bags of rags.

Griffiths prosecuted.

Ribton, Harris, Besley, and Williams separately defended.

On the prisoner Hilditch being searched, a letter was found in his pocket which the prosecution proposed to read.

Williams objected that the letter was written to the prisoner by his wife; and, inasmuch as the evidence of the wife would be inadmissible, a letter written by her to her husband was equally so.

Mr. SERJEANT COX.—The letter being found upon the prisoner is admissible in evidence. The fact, if it be so, that it was written by the prisoner's wife does not exclude its contents. What a wife

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says in the presence of her husband is admissible; and what she writes to him, if received and recognised by him, is equivalent to a statement verbally made by her in his presence. But the point is new, and I will reserve it if necessary. You must first prove the letter to be written by his wife.

A witness was called for the purpose, who, however, swore that it was not in the handwriting of the wife.

Guilty.

COURT OF CRIMINAL APPEAL.

November 11, 1871.

(Before KELLY, C.B., BYLES, J., PIGOTT, B., LUSH, J., and HANNEN, J.)

REG. v. BUTTERWORTH. (a)

*Partner—Stealing goods of co-partnership—Indictment—31 & 32
Vict. c. 116, s. 6.*

An indictment framed upon the 31 & 32 Vict. c. 116, s. 1, alleged that B. was a member of a co-partnership consisting of B. and L., and that B., then being a member of the same, eleven bags of cotton waste, the property of the said co-partnership, feloniously did steal, &c., contrary to the statute.

Held, that the indictment was not bad for introducing the word "feloniously."

CASE reserved for the opinion of this Court.

At the October Quarter Sessions for the Hundred of Salford, in the county of Lancaster.

Thomas Butterworth was arraigned on an indictment of which the following is a copy :

Lancashire, } The jurors for our Lady the Queen upon their
to wit. } oath present, that after the passing of an Act
made and passed in the thirty-first and thirty-second years of our
Lady the Queen, intituled "An Act to amend the Law relating to
Larceny and Embezzlement," Thomas Butterworth, the younger,
of Heap, in the county of Lancaster, was a member of a certain
co-partnership, to wit, a certain co-partnership carrying on the
business of and trading as waste dealers, and which said co-
partnership was constituted and consisted of the said Thomas

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Butterworth and of John Joseph Lee, trading as aforesaid, and thereupon the said Thomas Butterworth, at Heap, aforesaid, during the continuance of the said co-partnership, and then being a member of the same as aforesaid, to wit, on the seventh day of August, in the year of our Lord one thousand eight hundred and seventy one, eleven bags of cotton waste of the property of the said co-partnership, feloniously did steal, take, and carry away, against the form of the statute in such case made and provided, and against the peace of our said Lady the Queen, her crown, and dignity.

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It was proved that the partnership referred to was a *bonâ fide* trading partnership constituted by agreement between the prisoner and the said John Joseph Lee.

At the close of the case for the prosecution the counsel for the prisoner objected that the indictment, being framed under the statute 31 & 32 Vict. c. 116, s. 1, should have followed the terms of the said statute, and that it did not do so, and that the said indictment disclosed no indictable offence either at common law or under the said statute, and that the prisoner could not legally be convicted upon it.

The Court declined to stop the case, but reserved the above objection for the consideration of this Court.

The jury found the prisoner guilty, and the Court respited the sentence to the next sessions for the said Hundred of Salford.

The prisoner remains in prison for want of sureties.

The opinion of the Court is requested whether the above indictment is a good indictment under the said statute, and whether the prisoner was properly convicted upon it.

H. B. HIGGIN, Chairman.

The 31 & 32 Vict. c. 116, s. 1, enacts, "If any person, being a member of any co-partnership, or being one of two or more beneficial owners of any money, goods, or effects, bills, notes, securities, or other property, shall steal or embezzle any such money, goods, or effects, bills, notes, securities, or other property, of or belonging to any such co-partnership, or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such co-partnership, or one of such beneficial owners."

Cottingham, for the prisoner.—The indictment is bad because it does not follow the words of the statute 31 & 32 Vict. c. 116, s. 1. That enactment creates a new offence, one which did not exist at common law. It does not say that the offence shall be a felony, and the indictment is bad for using the word "feloniously." [LUSH, J.—If the offence created by 31 & 32 Vict. c. 116, s. 1, is not a felony, what is it?] There are offences of stealing which are not felonies, such as dog stealing, and unless the statute makes the stealing a felony, the introduction of the word "feloniously,"

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which is a term of art (*Reg. v. Gray*, 9 Cox C. C. 417; L. & C. 365), vitiates the indictment. [LUSH, J.—The 24 & 25 Vict. c. 96, s. 3, says that a bailee fraudulently converting property “shall be guilty of larceny”—this statute says that a partner who shall steal property of the co-partnership “shall be dealt with and tried, and convicted and punished as if he was not a partner.”] The indictment should have been for a common law larceny: (*Reg. v. Jesse Smith*, 11 Cox C. C. 511). The judgment of Willes, J., therein, was referred to.

Addison, for the prosecution, was not called upon.

KELLY, C.B.—The objection to the indictment is really not arguable. The statute expressly enacts that a partner who steals property of the co-partnership “shall be liable to be dealt with, tried, convicted, and punished, as if such person had not been or was not a member of the co-partnership.” That is what has been done in this case.

The rest of the Court concurring,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 11, 1871.

(Before KELLY, C.B., BYLES, J., PIGOTT, B., LUSH, J., and HANNEN, J.)

REG. v. JAMES KING. (a)

Larceny—Property—Evidence.

Prisoner was charged with stealing a mare, the property of E. The evidence was that prosecutor, in presence of the prisoner, agreed to buy of W. a mare for 5l., and that W. assented to take a cheque for the 5l. The prosecutor afterwards sent prisoner to W. with the cheque, and directions to take the mare to Bramshot Farm. On the next day prisoner sold a mare to S., which he said he had bought for 5l. When charged before the magistrate with stealing E.'s mare, he said he sold the mare to S., with the intention of giving the money to E., but that he got drunk:

Held, that that was sufficient evidence on which a jury might find that the mare sold to S. was the property of E.

CASE reserved for the decision of this Court at the General Quarter Session of the Peace for the county of Surrey, on Tuesday, the 17th of October, 1871.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

James King was tried on an indictment charging him with feloniously stealing a mare, the property of William Ellis, upon the following evidence:

William Ellis, of 92, West-street, Bermondsey, corn sampler, on his oath said: On Friday, the 22nd of September, I saw the prisoner on the Corn Market, in Mark-lane. He told me that he knew where there was a good-bred mare for sale, which would suit the purpose I wanted for breeding. I went to the place, Wilkinson's, St. Mary Axe, and saw the owner of the mare. I agreed to purchase the mare for 5*l*. Prisoner was present. Prisoner came back with me to Mark-lane. I had previously asked Wilkinson if he would take my master's cheque, and he said he would. I gave the prisoner my master's cheque for 5*l*. He was to give the cheque for the mare, and take the mare to my father's farm. I told him the direction on a paper, "Thomas Ellis, Bramshot Farm." Prisoner left me with the cheque. I did not see him till Monday following. On Tuesday, the 26th, I went to Winkley and Shaw's, Green-street, Blackfriars, horse slaughterers. I gave information to the police at Stones End. I found this mare at Winkley and Shaw's. On the following day Shaw gave me this mare. On the evening before I saw the prisoner in custody. I did not give the prisoner any authority to go to Winkley and Shaw. The mare was suffering from an injury; she went slightly lame.

Cross-examined: I don't think that I should have blamed him if he had found the horse lame and he had brought back the cheque or the money. I knew him two or three months before this transaction. I was told he came to my house on the Tuesday. On the 26th of September, in the evening, I went with two detectives to the prisoner's house. When I saw the mare at Winkley and Shaw's she did not go more lame.

Re-examined: I did not give the prisoner any authority to sell the mare to the horse slaughterer. He never told me what he had done with the mare, nor did he give me any money.

George William Shaw, on his oath, said: I am the firm of Winkley and Shaw. I am a horse slaughterer. I have known the prisoner some time. On a Saturday afternoon in September he brought a horse to my place. The horse was very lame, and had a very large wound. He said he bought it on speculation, and found it to be useless. I purchased it. I think he said that he had given 5*l*. for the horse. He asked me to give the most I could for it. I gave him 4*l*. This was on the 23rd of September, Saturday. On Tuesday following, the 27th, prosecutor called on me. I offered to give up the horse. The horse was taken to the police court. The prisoner was quite sober at the time he sold the horse.

Cross-examined: I have known him for several years. I believe him to be honest in his position. I have had transactions with him before. He made some remark that he was afraid the society would be at him for taking such a horse about the streets.

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Robert Pether, detective M, on his oath, said: On the 26th of September I took prisoner into custody. I said I wanted him for stealing a horse. He said he got drunk, met with an accident, and sold the horse to Shaw for 4*l.* 1*s.*

Cross-examined: I have known the prisoner for years; he is a respectable man.

The prisoner's statement before the committing magistrate was read as follows: I plead guilty. I found she was too injured, and sold her to Mr. Shaw with the intention of giving the money to Mr. Ellis, but unfortunately I got drunk.

The prisoner's counsel contended that there was not sufficient proof of the indictment; that there was no proof that the prisoner had got the mare from Wilkinson's in exchange for the cheque; and that it was not proved that the mare in question ever became the property of William Ellis.

The Court, however, left the case to the jury, but reserved the question for the decision of the Court for Crown Cases Reserved, whether there was sufficient proof that the mare was the property of William Ellis.

The jury returned a verdict of guilty, and the Court respited judgment until the decision of the Court for Crown Cases Reserved.

E. RICHARDS ADAMS, Chairman.

Horace Browne for the prisoner.—The indictment charges the prisoner with stealing a mare, the property of William Ellis, but the evidence does not support that allegation. There was no proof that the mare which Ellis saw and contracted for was the same as that which the prisoner took away. The question reserved for this court is, whether there was sufficient proof that the prisoner had got the mare from Wilkinson in exchange for the cheque, and it is submitted there is not.

Oppenheim, for the prosecution, was not called upon.

KELLY, C.B.—The question was one for the jury. The prisoner had the cheque given to him to go and pay for the mare and take it to the prosecutor's father, and he, the next day, disposed of a mare to Mr. Shaw. There is no doubt some evidence that it was the mare of the prosecutor, and the sufficiency of the evidence was for the jury.

LUSH, J.—The prisoner's own account was, that he had got drunk and disposed of the money for which he sold the mare, not that the mare was not Ellis's.

The rest of the Court concurring.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

November 18, 1871.

(Before KELLY, C.B., BYLES, J., PIGOTT, B., LUSH, J., and HANNEN, J.)

REG. v. HOLMES and FURNESS. (a)

Indecent assault—Evidence—Contradiction of prosecutrix.

On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix, she denied on cross-examination having had intercourse with a third person, S.

Held, that S. could not be called to contradict her upon this answer.

This rule applies to cases of rape, attempts to commit a rape, and indecent assaults in the nature of attempts to commit a rape.

CASE reserved for the opinion of this Court.

At the General Quarter Sessions of the peace holden in and for the county of Surrey, on Tuesday, the 17th of October, 1871, Henry Holmes and Joseph Frederick Furness were tried upon an indictment charging them with indecently assaulting one Sarah Palmer.

The prosecutrix, in her cross-examination, was asked by the prisoner's counsel if she had had connection with Robert Sharp, and she denied it.

The prisoner's counsel called the said Robert Sharp, and asked him if the prosecutrix had ever had connection with him, but the counsel for the prosecution objected on the authority of *Reg. v. Cockcroft* (11 Cox C. C. 410), and the court refused to allow the question to be answered, but reserved the point whether such answer ought to have been allowed to be given, for the decision of the Court for Crown Cases Reserved.

The jury found both prisoners guilty, and the court sentenced the said Henry Holmes to six calendar months' imprisonment with hard labour, and the said Joseph Frederick Furness to four calendar months' imprisonment with hard labour, both at the House of Correction at Wandsworth, in the said county, but respited the execution of the said sentences until the decision of

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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the Court for Consideration of Crown Cases Reserved should be known, and committed the prisoners to the custody of the governor of the common gaol at Newington in the said county in the mean time.

E. RICHARDS ADAMS, Chairman.

The case was remitted by this court to the sessions for the purpose of having a copy of the evidence stated, which was returned as follows :

Sarah Palmer, single woman, in service at Mrs Essex, 4, Blythe-terrace, South Lambeth-road : " On Tuesday night, September 5, my mistress gave me permission to go out and take tea with some one. Both my arms have been burnt, this prevents me from using my arms properly. At 6 p.m. I left home and took tea at the corner of Myers-street. I left at 8 p.m. to return home. I went past the house in which Holmes lives ; it is at the corner of Water-street. I called at my mother's ; she was not in. I left, and was going home. I saw Holmes and Furness at the door of Holmes's house. I spoke to Holmes ; Furness was there. I said, ' Holmes, have you seen my mother ? ' He said, ' No, Sarah ; I have not seen her. ' I left him, and walked towards home. Holmes and Furness came running after me to the corner of South Lambeth-road. Holmes said, ' Sarah, your mother wants you. ' I said to Holmes and Furness, ' Is it true ? ' They both said, ' It is quite true. ' I walked by the side of them down to where they said mother was. We passed a public-house called the Canton Arms. We walked straight down. It is a very dull street. I went down because they said mother was in a public-house there. When I was in this road, Holmes said [Witness then described the indecent assault in which Holmes was the actor and aiding Furness]. I met a gentleman and complained to him. This gentleman went home with me. I did not know him. My mistress was at home. I was to have been home by nine o'clock. It was ten o'clock when I got home. I was crying. I made a complaint to my mistress. They went for my mother ; she came, and I complained to her. I mentioned two names to my mother."

Cross-examined by counsel for Holmes : " I am sixteen. I have known Holmes before about twelve months. He had been very friendly with my mother. I have been to his house sometimes two or three times in a week. On this evening I did not go into Holmes's house. It was about a quarter past eight when I passed Holmes's house. This was in the South Lambeth-road. There are houses on both sides of the road. The road is lighted. The bricks were a good distance round. I have walked out with Holmes ; my mother and Mrs. Stafford were with us. Two gentlemen were looking on and watching while this was going on. The bricks were piled up. Both of them (H. and F.) pushed me. The hole is a very large one, deeper than my knees. I did not go down the whole time. There was a third young man ; he left

us ; he left me against my own house. Both the prisoners undid their trousers. I did not hear anyone pass by. This occupied about half an hour. Mrs. Essex lives a long way from the bricks. I knew a Mrs. Stafford and Robert Sharp three and a-half years. He has been a sweetheart of mine. I have not said to Charlotte that I would not have said anything about it unless my mistress had seen the dirt on my back. My mistress saw the dirt on my back, and found fault with me for being so late. Mrs. Stafford said, 'He has done nothing to you, don't go against Harry.' I said, 'I wont if I can help it, he would have done wrong if he could.' I have been familiar with Holmes and with Sharp. No connection has taken place between me and Sharp. I told Charlotte that I went to be examined, but they said it was no use, I ought to have been examined the same day."

Cross-examined by counsel for Furness : "I never had connection with any man whatever. On the same Sunday Charlotte asked me if I was in the family way. I did not tell Sharp that there was some yellow on my gown from the brick. Charlotte asked me if I was in the family way by Bob Sharp. I have seen Furness before ; he has spoken to me two or three times. I did not know his name. I said to my mother Holmes and another young man. I was in their company from a quarter-past eight till ten. I was not alone with Furness that evening. I screamed as loud as I could. Holmes had his arm on my mouth. I believe two gentlemen did go by ; they could not see me. There was no lamp where I was. I was in the back kitchen at Holmes's on Wednesday week. Holmes said, 'Sarah, I am truly sorry for what I have done to you, will you ask your father to make it up before you go into court?' Mrs. Stafford was present. I went there about nine. I drank beer with them. It was a wet evening."

Re-examined : "No man had ever done anything improper with me before. Mrs. Keightly is Sharp's sister. It was after this evening that Mrs. Keightly spoke to me ; this was after the first hearing before the magistrate. She said, 'Has Bob done anything to you?' I said, 'No ; he has not.' I saw Sharp last Sunday week. He was in the public-house when I went to get some ale. He, Sharp, said, 'I want to speak to you, I will come outside to you and leave my ale.' I was going home, he said, 'Sarah, I know no harm of you, I will take my oath of that. I will take off my coat and pawn it before I go against you. Do not go against Holmes. Make it up with him.' I said, 'I can't make it up, I must leave it to father.' He said, 'Don't go against him, he has no mother nor father.' Mrs. Stafford said, 'Kiss Holmes,' and I did, and shook hands with him. I saw a third man before I spoke to Holmes. When this took place no other man was present but Holmes and Furness. This took place in a street leading to South Lambeth-road. It led to Albert-square. It is a new street. There are houses on both sides of the way. The bricks were between the path and the houses. The pile was

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on the footpath. It led down as if you were going into the kitchen. The two men looking on seemed very respectable. They were on the other side of the road. I was not got into the hole."

Fanny Essex, 4, Blocke-terrace, South Lambeth-road: "Prosecutrix has been in my service five or six months. She was so in the month of September and is now. She has conducted herself in every way as I could expect. Her arms have been burnt previously to her coming into our service. Her hands are a little contracted. On the 5th of September I gave her leave to go to a tea party. She left about six and should have returned at nine, but did not till ten o'clock. I saw her as soon as she came in. Her things appeared to be in a disordered state. She was very confused. She appeared as if she had been crying. She made a complaint, and in consequence I sent for her mother. Her mother came in about half an hour, I was present when the girl saw her mother, she made a complaint, and a name was mentioned."

Cross-examined: "I complained to her about being late. There was a mark of dirt on her jacket. We had on one or two occasions to find fault with her for being long on her errands."

Eliza Palmer, mother of prosecutrix: "I live at 24, Water-street. My daughter will be seventeen next April. On Tuesday the 5th of April I received a message. I went to the house of Miss Essex about half-past ten p.m. I saw my daughter. She made a complaint, and was crying bitterly. She mentioned a name—only one. She referred to another person."

Cross-examined: I have known Holmes about twelve months. He is a respectable decent young man. He has been friendly with us. I do not know that my daughter was six months ago keeping company with Sharp."

George Palmer, father of the prosecutrix: "Prosecutrix is my daughter. Before I was examined at the police court, I saw the two prisoners the evening before they were both together. Holmes said—Furness was present—'I am very sorry, Palmer, to have done what I have done; I hope you will try to make it up.' I said, 'I do not know whether I can or not; I have left it in a gentleman's hands to carry the job through.' Furness said, 'I was with your daughter, Mr. Palmer, the evening before this occasion.' Holmes said, 'It is of no use your saying we were not there, for we were there.' I never had to find fault with my daughter, except for playing in the street."

Cross-examined: "When I gave Holmes in charge, he said 'I shall lose my work.' I once gave my daughter a smack on the head."

William Kempster, Div. W.: "On the 8th of September I took Holmes into custody. He was at Kennington-cross. I told him he was charged with indecently assaulting Sarah Palmer, at South Lambeth, on Tuesday, the 5th of September, with another one. He turned to the father, who was present, and said,

‘Palmer, can’t we settle this? It will throw me out of my situation if I am locked up.’ Palmer said, ‘No, I shall charge him.’ I was present on the first examination on the 8th of September. Furness was not then in custody. There were four examinations. Furness was taken into custody on the 29th. He came to the police court on behalf of Holmes. I know the place where the alleged assault took place. The street leads from South Lambeth-road to Albert-square. It is about two hundred yards to the square. Houses are being built. On the opposite side some houses are occupied, and some are empty. The street is twenty or thirty yards wide. There is a stack of bricks on the footpath close to where there is a hole. Prosecutrix told me she clung to the scaffold poles and the bricks.”

For the defence, Louis Elizabeth Keightly: “My husband is a corporal in the Royal Artillery, and I live at 17, Spring-place, Wandsworth-road, South Lambeth, near the residence of Palmer, the father and mother. I do not know anything of Holmes and Furness. I have known prosecutrix. I never had much conversation with her till Sunday night subsequent to the first hearing. She stopped me in Spring-place, I spoke to her. She told me the young man had not had connection with her that night. She said she was two months gone in the family way. She said she should not have told her mistress if she had not seen her clothes disordered and dirt on her back; this was after the first hearing. I believe it was on the 10th of September.”

Cross-examined: “Robert Sharp is my brother. He never told me she was his sweetheart. I was never intimate with her. I live in the same house with my brother. I did not know anything about this charge till she spoke to me about it. On Sunday night I went to the father and mother to know about it. I could not understand what the girl said or what she meant. I did not ask her any questions. She said she had been examined by two doctors. I never put any questions to her except how her mistress found it out. She told me she had been examined, but whether at her father’s house or at the hospital I cannot say. I never saw Holmes.”

Elizabeth Stafford, wife of George Stafford: “Holmes lodged in my house. On the 5th of September I first heard of this charge. On the 27th of September I met prosecutrix. We went into the Prince of Wales and had something to drink. I have seen Holmes and Furness together. Prosecutrix put her hand where she ought not. Prosecutrix said ‘He has not done anything to hurt me.’ I have seen her kiss him lots of times; she always kissed him first.”

Cross-examined: “I saw her put her hand where she ought not in a passage as she was coming back. It was some few weeks ago, not many before this charge was made, only a small time before he was locked up; it was between eight and nine in the evening. There was a lamp on the kitchen mantelpiece which threw a light. He was going to kiss her, and she was going to

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kiss him. She threw her hand like this (showing how). I told Mrs. Tyler I had forgotten to mention before the magistrate about her putting her hand where she should not. Every one said I should have to mention it. I was only examined once. I was asked whether I had seen anything more; I said no."

Robert Sharp: "I am nineteen years old. Q. Have you ever had connection with Sarah Palmer?"

Question objected to. Objection allowed.

Straight for the prisoners.—The authorities on this question are conflicting. The only defence raised at the trial was the consent of the prosecutrix to the alleged indecent assault. The evidence was material to the issue because it went to her credibility. The cases of *Rex v. Hodgson* (Russ. & Ry. 211), and *Reg. v. Cockcroft* are decisions against the admissibility of evidence to contradict the prosecutrix; but *Rex v. Hodgson* was decided at a period when a more extensive protection was allowed to witnesses than now. In that case the prosecutrix was told she need not answer the question, and she declined to answer, so that the question now raised did not arise. The question here is, the prosecutrix having denied having had connection with any other man whatever, can a man be called to contradict her, and prove that he has had connection with her? In this case the prosecutrix stands in a peculiar position in relation to the charge, and great latitude is allowed as to evidence affecting her general character. In *Reg. v. Eyre* (2 F. & F. 579) Byles J. held in a case of rape that not only what the prosecutrix said immediately after the occasion, but what was said in answer to her, was receivable. So Martin, B., in *Reg. v. Arnall* (6 Cox. C. C. 439) admitted on a trial for rape evidence of a conversation between two persons in relation to the charge made in the presence of the prosecutrix. The credibility of the prosecutrix is, to a very great extent, mixed up with the charge. The case of *Reg. v. Robins* (2 Moo. & Rob. 512) is a direct authority in favour of the admission of the evidence. In that case the prosecutrix denied having had connection with a man named. And Coleridge, J., after consulting with Erskine, J., said that neither he nor that learned judge had any doubt on the question, and that it was not immaterial to the question whether the prosecutrix had had this connection against her consent to show that she had permitted other men to have connection with her, which, on her cross-examination, she had denied. In *Rex v. Barker* (3 C. & P. 588), evidence of the general looseness of character of the prosecutrix was admitted, but Park, J., doubted whether particular acts of intercourse could be proved. In *Rex v. Martin* (6 C. & P. 562) Williams, J., allowed evidence to be given of the previous intercourse between the prosecutrix and one of the prisoners, but not between her and other men. In *Reg. v. Cockcroft* the prosecutrix declined to answer the question whether she had had intercourse with other men, and so the question did not arise.

Oppenheim for the prosecution.—It is submitted that the pro-

posed contradiction is not relative to the issue upon the indictment. Before the Common Law Procedure Act 1854, s. 24, the cross-examining counsel was bound by the answer of a witness to the question whether he had been convicted, but that section enables him to prove the fact by the production of the certificate of conviction in case the witness denies it. Evidence of a previous connection with the prisoner may be shown, but not with other men; for that is not relevant to the issue, as a rape may be committed on a prostitute. So, too, general evidence of lightness of character on the part of the prosecutrix is admissible. In *Rex v. Clarke* (2 Stark. Rep. 241) Holroyd, J., admitted evidence of the prosecutrix's loose character, but refused to allow evidence of particular acts.

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KELLY, C. B.—The question in this case is of very great importance, and if we had entertained a substantial doubt upon it, we should have desired the case to be re-argued before all the Judges: but, looking to the principle of evidence and the authorities upon it, it seems impossible to entertain a serious doubt that the evidence tendered to contradict the prosecutrix was inadmissible. On the trial of an indictment for a rape, or an attempt to commit a rape, or for an indecent assault, which in effect may amount to an attempt to commit a rape, if the prosecutrix is asked whether she has not had connection with some other man named, and she denies it, we are clearly of opinion that that man cannot be called to contradict her. The general principle is, that when a witness is cross-examined as to a collateral fact, the answer must be taken for better or worse, and the witness cannot be contradicted as to that by a third person. If the proposed evidence were receivable, the prosecutrix might be cross-examined as to the whole history of her life, and one, ten, or even fifty persons might be called to contradict her on various points of the evidence, and she be totally unprepared to meet the evidence of contradiction of any one of them. On principle, therefore, I am of opinion that the party cross-examining on such collateral facts must be bound by the answers, otherwise it would lead to a multiplication of collateral issues, and would be attended with great inconvenience and injustice to the prosecutrix. Upon the authorities, the ground for the rejection of the evidence is still stronger. *Rex v. Hodgson* is a decision that the prosecutrix is not bound to answer the question whether she has not had connection with another man named, and that evidence cannot be called to show that she had had such connection. That case, which is a direct authority, was confirmed by the twelve judges. Then there is the case of *Reg. v. Cockcroft*, in which Martin, B., and Willes, J., distinctly held that the prosecutrix was not bound to answer such questions, and that if she did, witnesses cannot be called to contradict her answers. We are now called upon to overrule those decisions, on the authority of *Reg. v. Robins*, where Coleridge, J., after consulting Erskine, J., admitted evidence to

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contradict. With regard to *Rex v. Barker* the evidence really amounted to this, that the prosecutrix was the associate of common prostitutes, and such evidence of general loose character has long been held to be admissible in cases of this nature; and so in *Rex v. Martin*. Such evidence has a direct bearing on the issue of consent or non-consent on the part of the prosecutrix. No doubt there was originally a difference of opinion on this question, but in the last case the evidence was rejected in accordance with the decision of the twelve judges in *Rex v. Hodgson*, and we have the single opinion of Coleridge, J., to the contrary. We must, therefore, declare our opinion that the evidence was inadmissible.

BYLES, J.—I am of the same opinion. The question is whether the prosecutrix, who denied having had connection with a particular man, can be contradicted by the man who is produced as a witness to swear that he had connection with her. That is not a contradiction material to the issue, for a rape may be committed upon a common prostitute. I have had the opportunity of consulting my brothers Willes and Keating, JJ., and they are of the same opinion as they have already acted upon, that the evidence of contradiction is not admissible. If the evidence is inadmissible in the case of rape, *à fortiori* it is inadmissible in the case of an indecent assault.

PIGOTT, B.—I think that such evidence of contradiction is not relevant to the issue, and would lead to injustice in many cases if it were receivable. The prosecutrix would be taken by surprise, and unprepared to rebut it.

LUSH, J.—I am of the same opinion. For a time I was inclined to a different opinion, but now I am quite convinced that the judgment of the Court is right, and that such evidence is too remote from the issue. The collateral issue has no bearing on the real one, whether or no the particular act complained of was done with the consent or against the will of the prosecutrix.

HANNEN, J.—I think there is no distinction between the cases of rape and indecent assault, so far as regards this question; the same reasoning is applicable to both. It may be regarded as a matter going to the general character of the prosecutrix; but still I think the issue of connection with a named person is inadmissible. It would be impossible for the prosecutrix to be prepared for such a contradiction, and the alleged intercourse might have been under similar circumstances to that under investigation.

Conviction affirmed.

NORTHERN CIRCUIT.

MANCHESTER.

December 7, 1871.

(Before Mr. Justice BLACKBURN.)

REG. v. ROTHWELL.(a)

Murder—Manslaughter—Provocation of words.

The general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter. But special circumstances attending such a provocation might be held to take the case out of the general rule.

CHRISTOPHER ROTHWELL was indicted for the wilful murder of his wife, at Oldham, on the 2nd of October.

Cottingham for the prosecution.

Torr for the defence.

The prisoner and deceased had been married about eight years; for several years after their marriage they lived at Stalybridge; they left Stalybridge and went to Oldham; from the evidence it appeared that they did not live happily there, but that frequent quarrels took place between them. The conduct of the wife was such as to arouse the prisoner's jealousy, and in consequence of his violence she left him and returned to her parents. At that time they had four children, and these the deceased took with her. After a separation of five or six weeks, a reconciliation took place, and they went to live together again. In a short time afterwards, however, they again quarrelled, and, on the 16th of September last, she again left him, and went to live with her parents; a few days afterwards the prisoner went to the house of the parents, and, meeting the deceased there, he knocked her down, and attempted to jump on her face; he was, however, prevented from doing that, but he injured her in another way. After this assault she left her parents' house, and did not return again, and the prisoner was unable to find out where she was. The prisoner expressed no contrition for the assault he had committed on his wife, but, on the contrary, made light of it, and said he could now go on with his work more comfortably. It also appeared

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

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that deceased had on one occasion taken something to procure abortion while she was cohabiting with the prisoner, but, although he was very angry at this, he forgave her. All the evidence pointed to the fact that he was extremely fond of deceased.

On the 1st of October the prisoner went to a girl named Agnes Longfellow, and she was called as a witness, and gave the following evidence:—

I saw prisoner on the 1st of October; he came to me to speak about his wife. I said I did not know where she lived. He asked me did I know she was keeping company with other men? I said I had heard so, but I would inquire where she was living. I said she had been to the Bull Inn on Saturday night drinking with a man at 11.15. I said I heard she was not then keeping company with a man name Basher. He said, "What a blessing; I should have sought the man, and perhaps in my passion have slain him innocently." He asked me to go and find her, and ask her to forgive and forget all, and go back to him and the children. This was at eight p.m. We then went to Swinton-street. I entered a house, and when I came out I found them talking together. He said he was asking her to forgive him. He said, "Why have you left me?" She said, "It came of those damned threats. You have often threatened to seek my bloody life for going to the dancing-rooms. He thinks of the children; with three of them what can I do?" He said, "We will go to a public-house, and she will forgive me this time, I know." She said she never would go with him, for if she did drink out of the same glass as him it would choke her. He said his arms were ready open to receive her; he would forget and forgive all. He asked her several times to forgive him. She said she refused to forgive him. He said, "Agnes can come and hear all I've to say, for I am not afraid." We went to the Rock Inn. Whiskey came in, he asked me to drink first, and then he asked her. She said she would not, it would choke her. He said, "It is queer after so many years you can't drink out of the same glass without being choked." He then again asked her to forgive him, and to think of the children. She said, "To hell with the children! It is very odd you can't keep the children when I pay five shillings for Agnes." He asked her again to come back to him. She refused. He said, "No; you are thinking of a better game—knocking about with these men." She had on new kid gloves, and he asked her where she got them. She said, "Never mind; thou has not bought them." She then took off her gloves, and he saw she had not her wedding-ring on, but had another one on. He said, "Where is it? As thou hast given up the chap, give up the ring." She said she would not give up the chap. He asked who had given her the other ring? She said, "Never mind; thou has not given it me." The stick he had formerly in his hand was now lying down. He asked her again to come back with him, and said, "Think how I pulled thee when thou came back before. Had not thee been taken stuff to get abor-

tion?" She said, "Aye; but I'll take no more for thee, for I'll have no more children of thee. I have done it once, and I'll do it again."

The tongs were at his hand, and he took them up, and he struck her on the left side of the head; he then struck her two violent blows on the head. From the effects of these blows she died in about a week.

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BLACKBURN, J., in summing up, said: A person who inflicted a dangerous wound, that is to say, a wound of such a nature as he must know to be dangerous, and death ensues, is guilty of murder; but there may be such heat of blood and provocation as to reduce the crime to manslaughter. A blow is such a provocation as will reduce the crime of murder to that of manslaughter. Where, however, there are no blows, there must be a provocation equal to blows; it must be at least as great as blows. For instance, a man who discovers his wife in adultery, and thereupon kills the adulterer, is only guilty of manslaughter. As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having had no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: "Aye; but I'll take no more for thee, for I will have no more children of thee. I have done it once, and I'll do it again." Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did.

Guilty of manslaughter; ten years penal servitude.

COURT OF CRIMINAL APPEAL.

*Saturday, Jan. 20, 1872.**(Before COCKBURN, C.J., MARTIN, B., and CHANNELL, B.,
KEATING, J., and LUSH, J.)*

REG. v. NEWBOULT AND HOLDSWORTH.(a)

*Arson—Ownership of house set fire to—Intent to defraud insurance
office—Evidence—24 & 25 Vict. c. 97, s. 3.**An indictment under 24 & 25 Vict. c. 97, s. 3, for setting fire to a
house, shop, &c., need not allege the ownership of the house.**The evidence in support of the intent to injure was, that the
prisoner N. was under notice to quit, and a week before the fire
was asked to leave, but did not. Of the intent to defraud, the
evidence was that in 1867 he called on an agent about effecting
an insurance, and that in 1871 he called on him again, and said
he had come to renew his policy for 500l., and paid 10s.**Held, that the above evidence was sufficient to prove the intent to
injure and defraud.*

CASE reserved for the opinion of this Court by PIGOTT, B.

The prisoners were tried before me at the last Winter Assize for the West Riding of Yorkshire holden at Leeds on the charge of arson.

The substance of the indictment is as follows :—

First count.—That Joseph Newboul and Benjamin Holdsworth maliciously and feloniously did set fire to a shop of and belonging to the said Joseph Newboul, and then being in the possession of the said Joseph Newboul, with intent thereby to injure, against the form of the statute.

Second count was in the same form, except that the intent laid was to defraud.

The third count stated that the said Joseph Newboul and Benjamin Holdsworth unlawfully, maliciously, and feloniously did set fire to divers matters and things, then being in and under a certain shop there, of and belonging to the said Joseph Newboul, and then being in the possession of the said Joseph Newboul, with intent thereby and by means thereof unlawfully, maliciously,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

and feloniously to set fire to the said shop, and thereby to injure and defraud: and the said Joseph Newboul and Benjamin Holdsworth, by the overt acts in this count mentioned, unlawfully, maliciously, and feloniously did attempt to set fire to the said building in this count mentioned, under such circumstances, that if the same had thereby been set fire to, they would have been guilty of felony against the form of the statute.

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At the conclusion of the case for the prosecution, it was objected on behalf of the prisoners, that as no policy of insurance upon the premises was produced, there was no evidence from which the jury could infer an intent to injure the insurance office.

And secondly, that upon the counts of this indictment, it was not open to the jury to convict of an intent to defraud or injure the owner of the premises, inasmuch as the premises were in the indictment alleged to be "of and belonging to Joseph Newboul" himself, and must hence be taken to be his property.

I refused to stop the case, but reserved the question for this Court.

The prisoner Newboul was the master and Holdsworth was the servant in the shop at Leeds-road, Bradford, where a general grocery business was carried on, and where a fire occurred on the 5th of October last.

The material evidence on which the counsel for the prosecution relied, to show the intent to injure or defraud, was as to the ownership of the premises as follows:—

John Hey stated that he was a trustee of the premises for the landlady, and that Joseph Newboul was under notice to leave, and should have left on the 5th of September last, and that the witness, a week before the day of the fire, had asked him to leave the premises, which he had not done.

And as to the other objection, evidence was given that a notice to produce a policy of insurance (effected by the prisoner Newboul on his stock) was served on him, but too late to be complied with, and I held it was insufficient on that ground.

The counsel then called a witness from the insurance office, who said, "Newboul came to me in May, 1867, about effecting an insurance, and that on the 30th of August of the present year (1871) he came again, and said he wished to renew his policy in Leeds-road for 500*l.* (the same amount), and that he then paid me 10*s.*

The stock of goods on the premises at the time of the fire was of the value of 21*l.*

Both prisoners were found guilty.

And I asked the jury if they believed that Newboul was tenant of the premises, and, further, whether both prisoners had an intent to injure the landlady? And, also, whether they believed they had an intent to defraud the insurance company.

The jury answered that they found both intents.

The questions for this Court are whether: First, there is sufficient evidence of the existence of an insurance to support the

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finding by the jury of an intent to defraud the office; and, secondly, whether on these counts, it was competent for the jury to find there was an intent to injure the owner of the premises. If either of these questions is answered in the affirmative, then the sentence which was passed is to be carried into effect, otherwise a verdict of not guilty is to be entered.

G. PIGGOTT.

Waddy, for the prisoners.—The prisoners ought not to have been convicted, for upon this indictment it was not competent to show that the shop belonged to any other owner than Newboul. The indictment alleges that it was Newboul's shop and belonged to him. [MARTIN, B.—The question is whether you cannot strike out the words "of and belonging to Joseph Newboul?" Is it necessary to allege in the indictment the ownership of the shop?] It is and it has always been alleged in the precedents: (2 East, P.C. 1034, c. 21, s. 11.) In Arch. Crim. Plead. 507, the form of indictment given is "a certain dwelling-house, shop, &c., of J. N., situate." The allegation is necessary for this reason, that it is no offence to set fire to one's own house or shop, unless with intent to injure or defraud any person. [MARTIN, B.—This indictment is under the 24 & 25 Vict. c. 97, s. 3, and that section says nothing about the ownership of the house, &c., set fire to, but only "whosoever shall unlawfully and maliciously set fire to (*inter alia*) any shop with intent thereby to injure or defraud any person, shall be guilty of felony." All that is necessary is to allege and prove a crime within the words of the Act. [COCKBURN, C.J.—And sect. 60 enacts that it is not necessary to allege an intent to injure or defraud any particular person. [KEATING, J.—It would be sufficient, you say, if it had been alleged merely that the shop was in the possession of Newboul. LUSH, J.—The words "of and belonging to" would be satisfied by proof of a week's possession; they merely mean that the occupier had some interest in the shop. The indictment is consistent with some one else also being owner.] Here the ownership is alleged to be in Newboul, and it was not competent to prove ownership in anyone else. Then there was no proper evidence of the policy of insurance. [COCKBURN, C.J.—There was abundant evidence of that. The evidence is that he went to the agent in 1867 about effecting an insurance, and that he went again to him in 1871, and said he wished to *renew* his policy for 500*l.*, and paid 10*s.*; that is an admission by him that there was a policy.]

Campbell Foster, for the prosecution, was not called upon.

By the COURT.—There was clear evidence that the prisoner had committed the offence against sect. 3 of the Act. The averment in the indictment is not an averment of ownership in fee simple, which it is necessary to prove. It may be rejected as

a superfluous averment. There was abundant evidence of the existence of an insurance to support the finding by the jury of an intent to defraud the office.

Conviction affirmed.

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MIDDLESEX SESSIONS.

February 6th, 1872.

(Before Mr. Serjeant Cox.)

REG. v. JACOBS.

Larceny.

B., making a purchase from the prisoner, gave him half-a-sovereign in mistake for a sixpence. Prisoner looked at it and said nothing, but put it into his pocket. Soon afterwards B. discovered the mistake, and returned and demanded the restoration of the half-sovereign. Prisoner said, "All right, my boy; I'll give it to you"—but he did not return it, and was taken into custody.

Held, not to be a larceny.

INDICTMENT for larceny.

Harris for the prosecution.

M. Williams for the prisoner.

The facts proved were, that on the 30th January the prosecutor was in the City Road, having in his pocket half-a-sovereign and a sixpence. The prisoner was there selling rings, &c. Prosecutor bought a ring for a penny, and by mistake gave the prisoner the half-sovereign instead of the sixpence. The prisoner gave the prosecutor fivepence in change. Prosecutor went away, but soon afterwards discovered his error, and came back and told prisoner he had made a mistake, and requested the return of the half-sovereign. The prisoner said, "All right, my boy: I'll give it to you," and walked away. Prosecutor followed him and he said, "Come on till we get to a light, and I will look." But he did not return the half-sovereign, and was given into custody.

Williams contended that this was not a larceny in law. The prosecutor had passed the property in the coin to the prisoner, who had not obtained it by any trick or fraud on his own part.

Harris for the prosecution.—The prosecutor did not intend to

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give a half-sovereign but a sixpence, and, therefore, no lawful possession of it was in the prisoner.

The JUDGE.—At what moment do you say that the larceny took place?

Harris.—At the moment when, having the half-sovereign in his hand, he knew it was a half-sovereign and not a sixpence.

The JUDGE.—But then he had the possession, and the property in it had passed. It had come into his lawful possession. Whatever might have been his subsequent dishonest intent, if the original possession was not felonious, no after conversion would be larceny.

Harris.—But the prosecutor, intending to give one coin, gave another, and did not intend to pass to the prisoner a property in the gold.

The JUDGE.—Not so. He intended to give the prisoner the particular piece of coin he held between his fingers, although he was mistaken as to the nature of that coin. At the instant of its passing from the fingers of the prosecutor to the hand of the prisoner, he intended to give, and the other intended to receive the coin so held, and it was not until the possession was complete that either party discovered the mistake. But the point is new, and I will consult the Assistant-Judge upon it.

After consulting with the Assistant-Judge, his LORDSHIP said: I have taken the opinion of Sir Wm. Bodkin upon the question raised in this case, and we are both of opinion that this is not a larceny.

Verdict, Not guilty.

OXFORD CIRCUIT.

STAFFORD LENT ASSIZES.

March 12, 1872.

(Before Baron CLEASBY.)

REG. v. VERNON. (a)

Evidence—Confession to a person in authority.

A female prisoner, in custody on a charge of murder, desiring to go a water-closet, was sent there by the police with a woman who was impliedly authorised to prevent her escape. When alone together in the closet, the woman, an acquaintance of the prisoner, alluding to the crime, said: "How came you to do it?" whereupon the prisoner made a statement in the nature of a confession. Held, that the statement was not induced by any hope or fear caused by a person in authority, and was, therefore, admissible in evidence against the prisoner.

THE prisoner was indicted for the wilful murder of her child, Thomas Vernon.

McMahon and Godson prosecuted.

Evelyn Ashley defended the prisoner.

The alleged offence was committed by casting the infant into a pond. After the prisoner was taken into custody, the police-officer having charge of her directed the landlady of the inn, who was an acquaintance of the prisoner, to accompany her to a privy, whither the latter had occasion to go. Being there together alone, the woman said to the prisoner, "How came you to do it?" In answer to which question the prisoner made a statement.

Ashley objected to evidence being given of the statement. The woman who, acting under the authority of the police, had the prisoner in custody, was *pro hac vice* a constable herself, and anything said by the prisoner in reply to her questions was not free and voluntary, and, therefore, cannot be used against her as an admission.

McMahon.—She was no warder, had no superintendence over the prisoner, uttered no threat, nor held out any inducement to confess.

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

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—
*Evidence—
Confession.*

Ashley.—The principle upon which such admissions are excluded is not confined to verbal threats or inducement. Here the prisoner, being naturally influenced by the authority which the female had, or might reasonably be supposed to have, over her, would no doubt feel compelled to make some answer to the question put. Or there was an inducement—some hope presented to the prisoner that the woman who had known her for a long time might befriend her. Where a girl, being apprehended for the murder of her child, was left by the constable in the custody of a woman, who told her she had better tell the truth, otherwise it would lie upon her, and the man would go free, upon which she made a confession, Parke, J., and Taunton, J., held this confession not receivable, as it was made in consequence of an inducement held out to the prisoner by a person who had her in custody (*Reg. v. Enoch*, 5 C. & P. 539). He cited also *Reg. v. Windsor* (4 F. & F. 361), *Reg. v. Bates and others* (11 Cox C. C. 686).

CLEASBY, B. (after consulting BYLES, J.).—I think this evidence is admissible, and that there was nothing in the nature of an inducement or threat used by the woman who had, to a certain extent, the authority of the police not to let the prisoner escape, but was not in any way filling the character of a person in authority.

The prisoner was convicted and sentenced to death, but the punishment was afterwards commuted for penal servitude.

Attorney for the prosecution, *Hand*, Stafford.

WESTERN CIRCUIT.

WINCHESTER SPRING ASSIZES.

March, 1872.

(Before Baron BRAMWELL.)

REG. v. SPANNER.

Burglary—Evidence of attempt to commit—What a sufficient attempt to enter.

An attempt to commit a burglary may be established on proof of a breaking with intent to rob the house, although there be no proof of an actual entry.

JOSEPH SPANNER was indicted for burglary with intent to steal.

The evidence was to the effect that a female servant in the house heard a noise as of thumping at one of the windows at about half-past one o'clock in the morning. She got out of bed, and then heard a noise as of the smashing of glass; she went downstairs, opened the front door, and saw a man, who ran away immediately on seeing her, but she afterwards identified him as the prisoner. On examining the house she found a pane of glass broken in one of the windows, just over the fastening; the broken glass had fallen inside the window, and the hole made thereby was large enough to admit a man's hand, so as to enable him to unfasten the window; but the window was not unfastened, and nothing had been taken out of the house. The witness was corroborated as to the identity of the prisoner by evidence as to certain footprints near the window, which corresponded with impressions made from the boots the prisoner was wearing when apprehended on the same morning.

There was no proof that any part of the prisoner's person had actually entered the window.

The learned Judge said he thought there was no sufficient evidence of an attempt to commit a burglary; that it was necessary to prove not only a breaking but an entering. There was evidence of a breaking, but not of an entering.

The prisoner was not defended by counsel.

Folkard (for the prosecution) submitted, that for the purpose of establishing an attempt to commit a burglary it was not necessary to prove an actual entry, if it was clear upon the evidence that the intention of the prisoner was to enter; that the evidence of the breaking being clear, that evidence was to be

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—
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commit bur-
glary—
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considered by the jury with all the surrounding circumstances, viz., that the glass was broken just over the fastening of the window, and at half-past one o'clock in the morning, when all the inmates of the house had retired to rest; and that there was sufficient evidence to go to the jury as to whether or not the intention of the prisoner was to enter and commit a burglary, and that he only desisted from such intention on hearing some person about the house. That from the fact of his having broken the window, and pushed the glass inside, there was presumptive evidence that some part of his hand must have entered the house; and if no such presumption in law, there was still sufficient evidence to go to the jury as to an attempt to commit a burglary, and he cited *Rex v. Davis* (Russ. & Ry. 499), where it was held that merely thrusting the finger through a broken pane of glass was a sufficient entry.

BRAMWELL, B., said that, in the case cited, the prisoner's finger was seen on the inside of the glass, he still expressed a doubt as to whether it was not necessary to prove an actual entry, but, after consulting with MARTIN, B., ordered the case to proceed. In summing up the case to the jury, he directed them that there was no evidence of a burglary; there was evidence of a breaking, and if the jury were satisfied that the prisoner attempted to commit a burglary, they might find him guilty of the attempt. They were to take into consideration the evidence as to the glass being broken close to the latch of the window, and at one o'clock in the morning. What honest purpose could the prisoner have had? If you think the person who broke the glass did so with the intention to enter and rob the house, you may find that person guilty of an attempt to commit a burglary. He then directed the attention of the jury to the evidence as to the identity of the prisoner.

The jury found the prisoner *Guilty*, and, on prior convictions being proved against him, he was sentenced to

Eighteen months imprisonment, with hard labour.

OXFORD CIRCUIT.

GLOUCESTER LENT ASSIZES.

April 7, 1872.

(Before Baron CLEASBY.)

REG. v. GRATREX. (a)

*Manslaughter—Abandoned mine unfenced—Duty of owner—
23 & 24 Vict. c. 151, s. 21.*

23 & 24 Vict. c. 151, which imposes on the owner of an abandoned mine the duty of securely fencing the same, does not apply to mines abandoned before the passing of the Act.

THE accused was indicted for the manslaughter of John Tucker.

Sawyer prosecuted.

Huddleston, Q.C., and *George Browne*, appeared for the defence.

The deceased was last seen alive as he left his lodgings on the night of the 14th November, intoxicated. His dead body was afterwards found at the bottom of the shaft of a coal mine, down which he was presumed to have fallen. No highway was near the pit, but a footpath ran past it four yards away.

The accused was a banker, and the owner of the legal estate in the coal mine, which became vested in him as a trustee by way of security for a debt due to the bank. The pit, being worked out, had been abandoned in the year 1851 by the accused, who then caused a proper arch to be built over the mouth of the disused shaft, but it appeared that this covering had been in the course of time destroyed by trespassers. Dead rent for the mine had been paid by the accused ever since the working had ceased, and he, therefore, was alleged on the part of the prosecution to be the owner of the pit within the terms of 23 & 24 Vict. c. 151, s. 21, (b)

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

(b) 23 & 24 Vict. c. 151, s. 21, enacts that "Where any coal mine, colliery, or ironstone mine is abandoned, or the working thereof discontinued, or where the working thereof is recommenced after abandonment or discontinuance for a period exceeding two months, or where any workings are commenced for the purpose of opening a new coal mine or ironstone mine, the owner or agent of the respective mine or working shall in every such case give notice thereof to the inspector of the district."

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by negligence.*

and, as such, liable to the obligation of properly fencing the same.

The above facts having been stated by the learned counsel for the prosecution in opening the case—

Huddleston, Q.C., and *George Browne*, submitted that the facts, if proved, would not support the indictment, for the statute relied upon as creating the duty to fence was not retrospective, and had no application to mines abandoned before the passing of the Act. They referred to sects. 7, 10, and 21.

Sawyer (*contra*) argued that although the first part of sect. 21 provided for the giving of notice within two months of abandonment of a mine, and, therefore, could not be said to apply to mines disused years before the date of the enactment, yet that the latter part of the clause was distinct from the former, and compelled owners of all abandoned mines to fence the same.

CLEASBY, B.—It appears to me that it is unnecessary to go into the evidence on the case, because I do not think that Mr. Gratrex is within the peril of this indictment. In the first place, it is quite clear there is no obligation cast on him by the common law, for this old pit was not a nuisance, although if it had been upon the highway, or even adjoining it, so that a person could not use the road without danger, it might have been such. But I am also clearly of opinion that the offence charged does not come within the terms of the statute. I think the question substantially is, whether it falls within sect. 21? I certainly think it cannot be maintained that this Act is a declaratory statute. It is a new enactment. It would be absurd to say that it should declare, as a matter of law, that pits already abandoned should be fenced and yet require that two months notice of abandonment should be given. I clearly think that it is merely an enacting statute, and must be construed strictly. A new responsibility must be created in clear and express terms. I have heard what was said by counsel on both sides, and my impression is, that the Act cannot be read as it was suggested for the prosecution it should be. Mr. Sawyer, indeed, argued that the latter part of the section was distinct from the former; but, far from that being so, the first provision is, that when a pit is abandoned the owner shall give notice within two months. I think that must have referred to what may take place after the passing of the Act; the words used tie the two parts of the section together, and it seems to me quite clear that under this section the duty and obligation does not attach to a mine which has been abandoned years and years before. We find that at the time this mine was abandoned that had actually been done which it is alleged the defendant was

by letter sent through the post office, within two months after such abandonment, discontinuance, recommencement, or commencement of working, as the case may be; and where any such mine or colliery is abandoned, or the working thereof discontinued, the owner thereof shall cause the same to be, and to be kept, securely fenced for the prevention of accidents."

bound by law to do when he gave up the pit—that he had in fact done his duty by causing a cover to be placed upon it, and he cannot, except by an express enactment, be subjected to a new burden of responsibility.

Not guilty.

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v.
GRATHEX.
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by negligence.*

Attorneys for the prosecution, *Fryer and Oxeley*.
Attorney for the accused, *Williams*.

OXFORD CIRCUIT.

GLOUCESTER LENT ASSIZES,

April 8th, 1872.

(Before Baron CLEASBY.)

REG. v. HALL. (a)

*Forgery.—Promissory note.—Secondary evidence of
missing document.*

If the forged writing be not produced at the trial of the forger thereof, the best proof that can be given of the loss or destruction of the original instrument must be adduced before a copy may be used as secondary evidence.

Therefore, where the only evidence of the loss of a forged note was that of the attorney for the prosecution, to whom it had been entrusted, and who swore that he had last seen it when he placed it in an old purse, which he afterwards laid by in his office as useless, and finally gave to his clerk; and that he had made thorough search and inquiry, but was unable to find the note, and believed it to have been burnt with the purse, by the clerk.

Held, that the latter should have been called as a witness, and in the absence of his testimony, no sufficient proof of the loss or destruction of the note had been given to lay the foundation for the admission of secondary evidence of the instrument.

THE accused was indicted for forging a promissory note, and uttering the same knowing it to have been forged.

Sawyer prosecuted.

George Griffiths defended.

The note alleged to be forged was not forthcoming at the trial. It appeared that the original note had been produced before

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

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v.
HALL.
—
1872.
—
*Evidence—
Lost document.*

the committing justices, and their clerk, having copied it upon the depositions, gave it to the attorney for the prosecution. The latter was called as a witness to prove the loss of the note. He stated that he had made thorough search and inquiry for the instrument, but was unable to find it; that he last saw it when he put it into an old purse, which, being worn out, he afterwards placed in a drawer at his office, and eventually gave to his clerk, who, as he believed, had burnt the purse as valueless. The clerk was not present to testify to this.

The copy in the depositions being offered as evidence, the counsel for the defence objected. First, secondary evidence cannot be received. In Archbold's Pleading and Evidence in Criminal Cases, 16th ed. p. 239, it is said that "upon an indictment for forgery it is the generally understood rule, that the prisoner cannot be convicted unless the forged instrument be produced."

Secondly. No foundation for secondary evidence of this note has been laid, as the original is not proved to have been lost but only to have reached the hands of the clerk, who may now have it safe in his possession, and should be called to account for its non-production.

Sawyer, contra.—The proof of the loss is sufficient. Every search and inquiry has been made for it by the attorney for the prosecution, who had the care of it; he is unable to find it, and believes it to have been destroyed. To call every clerk in the office who might have seen, or had it would be unnecessary.

CLEASBY, B.—This is to my mind a very clear case, and my brother Byles, whom I have consulted, entirely agrees with me in the conclusion at which I have arrived. Without at all adopting the rule suggested, that except the forged document is in the possession of, and produced by the prosecutor the forger cannot be convicted, it is sufficient for the determination of the present question to say that the principle which requires an original document to be accounted for before secondary evidence of it can be received, must be strictly observed in cases of this description, and it is of the highest importance that this should be so, because it is evident that if the prisoner has not an opportunity of shewing the document itself to the jury, and asking them whether on inspection they think it to be forged or not, he is under a great disadvantage. But the prosecution here fails on another ground, viz., that the original instrument is not proved to be lost; on the contrary, it is even proved *not* to be lost. It is not produced and the evidence is that it was in a purse given by the attorney for the prosecution to his clerk. We hear that it is destroyed, but the clerk, who is said to have burnt it, is not called to give his testimony upon the subject, and the only proof which could properly have accounted for the nonproduction of the bill, would be that of the person in whose custody it was last seen. Therefore the case cannot be completed without a copy of

the bill being used in evidence, and as no foundation has been laid for the admission of the copy, the prosecution fails.

Attorney for the prosecution *Dix*.

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v.
HALL,
—
1872.

*Evidence—
Lost document.*

NORFOLK CIRCUIT.

HUNTINGDON SUMMER ASSIZES, 1871.

(Before Lord Chief Justice COCKBURN.)

REG. v. SHIPPEY. (a)

Murder—Evidence of motive.

The prisoner was indicted for murder, and it was suggested by the prosecution that the motive of the prisoner was to get rid of the deceased, who was a witness against him for an assault for which he had been committed for trial, but acquitted, in consequence of the absence of the deceased. The deposition of the deceased taken upon the original charge of assault was tendered, in order to show that the deceased was a material witness:

Held, that the deposition being taken prior to the passing of 11 & 12 Vict. c. 42, was not admissible.

EDWARD SHIPPEY was indicted for the wilful murder of Thomas Saunders Lamb, at Huntingdon, on the 21st of December, 1841.

Merewether and J. W. Cooper, for the prosecution.

Metcalf and Cockerell, for the prisoner.

This was a very peculiar case, inasmuch as the crime had been committed upwards of thirty years ago. The deceased was a police constable of the borough of Huntingdon, and had preferred a charge of assault against the prisoner and three others since dead, who were all committed to the sessions at Huntingdon, to be held in January, 1842, to take their trial. A few days before the sessions the deceased was missing, and it was alleged that, in consequence of his absence, the four defendants were acquitted.

Merewether proposed to put in evidence the deposition of Lamb, the deceased, affecting the prisoner on the charge of assault, as

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

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v.
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Murder—
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showing that he was a material witness, suggesting this as a motive for the crime.

Metcalf objected.

The LORD CHIEF JUSTICE was of opinion that as the deposition of Lamb proposed to be put in was taken prior to 11 & 12 Vict. c. 42, it was inadmissible, and thought it ought not to be pressed.

Merewether said he merely tendered it; he had great doubts of its admissibility.

The prisoner, after a long trial, was

Acquitted.

NORFOLK CIRCUIT.

CAMBRIDGE SPRING ASSIZES, 1871.

(Before Chief Baron KELLY.)

REG. v. CRAWLEY.(a)

Perjury—Indictment.

Upon an indictment for perjury committed before magistrates at petty sessions, upon a charge of stealing suet, the assignment was that the defendant falsely swore that he saw one Coates take the suet.

Held that as the indictment did not aver that Coates took the suet feloniously, it was bad.

THE prisoner was indicted for perjury, alleged to have been committed before magistrates sitting at petty sessions, upon a charge of stealing suet.

Blofeld for the prosecution.

Hensman for the prisoner.

It appeared that the perjury assigned was a statement made by the prisoner, in his deposition before the magistrates, in which he said I saw Coates, the person then charged, take the suet. This was incorporated in the indictment, which did not allege it to have been so taken feloniously.

KELLY, C.B.—It is true that this statement of the prisoner may

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

mean that Coates took it feloniously, but it does not so appear that he swore falsely to that; he simply said "I saw him take it." These cases ought to be narrowly investigated and the charge distinctly and properly laid. I think the indictment is defective, and I shall direct an acquittal.

Not Guilty.

REG.
v.
CRAWLEY.
—
1871.

*Perjury—
Indictment*

OXFORD CIRCUIT.

OXFORD LENT ASSIZES.

March 2, 1872.

(Before Mr. Justice BYLES.)

REG. v. MARK LEWIS.(a)

Perjury—Jurisdiction of justices—Alehouse licence—Production of.

On trial for perjury alleged to have been committed before justices at the hearing of an information under the Beer-house Licensing Acts against the keeper of such a house, his licence must be produced in order to show the jurisdiction of the justices and the materiality of the false evidence.

THE prisoner was indicted for perjury at a petty sessions held at Deddington.

Bosanquet and H. D. Greene, for the prosecution.

J. O. Griffiths, for the prisoner.

It was proved that the brother-in-law of the prisoner was the keeper of a public-house near Deddington, at which, on Whit-Monday, 1871, a feast was held. In his occupation, but a few hundred yards from the public-house, was a field containing a shed, which was used at the feast for a skittle alley. The police there found, in the presence of the publican, several persons playing at skittles for quarts of ale, which were supplied from the public-house. An information was laid against the publican for "knowingly suffering gaming, contrary to the tenor of his license." The words, "on your licensed premises," which appeared on the printed form of information, were purposely struck out by the magistrates' clerk, at the instance of the police, when the information was laid. A summons following the

(a) Reported (*ex rel.*) by JOHN ROSE, Esq., Barrister-at-Law.

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v.
LEWIS.
—
1872.
—
*Perjury—
Jurisdiction—
Evidence.*

words of the information was issued, to which the publican appeared. On the hearing of the information, the prisoner swore that there was no gambling for quarts of ale at the time and place alleged by the police. The publican was convicted, and the prisoner committed for perjury.

The above facts having been proved in evidence, but the publican's license not having been produced,

J. O. Griffiths, for the prisoner.—There was no evidence of any offence having been committed for the justices to inquire into. The information disclosed none, for it is not any offence to game or permit gaming in private premises; and it was not alleged in the information, nor was it attempted to be proved, that the shed formed part of the licensed premises. The justices had no jurisdiction to convict the publican, and here there is not proof of any jurisdiction in them to convict him. In the absence of the license, it does not even appear that the person charged before the justices was a licensed person, nor whether the shed formed part of the licensed premises; nor does it appear that anything was done contrary to the tenor of it, for its terms and conditions cannot be proved otherwise than by its production while it is in existence. Besides this, in the absence of the license and without knowing its tenor, it is not possible to determine whether what the prisoner said was material to the issue before the justices. If the shed was not part of the premises, the evidence of the prisoner as to what took place there was immaterial.

Bosanquet replied.

BYLES, J.—I do not think the prisoner can be convicted of perjury. To constitute perjury the evidence upon which it is assigned must be material to an issue raised in judicial proceedings before a court of competent jurisdiction. I am of opinion that the justices had no jurisdiction to deal with the charge against the person summoned before them, in the absence of proof that he was duly licensed to sell excisable liquors by retail.

Verdict Not Guilty.

Attorney for prosecution, *Lovell*, of Deddington.

Attorneys for prisoner, *Risley* and *Stoker*, London.

STAFFORD LENT ASSIZES.

(Before Mr. Baron CLEASBY.)

REG. v. JOHN WILLIS.

THE prisoner was indicted for perjury at a petty sessions at Burton-on-Trent, on hearing of an information against Ann

Jones, the keeper of a beer-house, for knowingly permitting drunkenness on her premises, contrary to the tenor of her license.

Bosanquet, for the prosecution.

H. D. Greene, for the prisoner.

The information and summons having been proved, the Clerk to the Magistrates was called to prove the evidence given by the prisoner.

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v.
WILLIS.

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*Perjury—
Jurisdiction—
Evidence.*

Greene submitted that as the license to the beerhouse-keeper was not produced, there was no proof of the justices' jurisdiction. If the beer-house was not licensed there could be no offence as to which the justices could inquire.

Bosanquet.—The justices had jurisdiction to hold the inquiry, because the information charged an offence which they had authority to try. It may be that proof of the license was necessary to establish the charge before the justices, but its absence would only be a ground for their dismissing the complaint, and would not prevent their having jurisdiction. If they had no jurisdiction, how could they inquire whether there was a license?

Greene, in reply.

CLEASBY, B. (after consulting Mr. Justice Byles).—I am of opinion that it is not sufficient to show a general jurisdiction in the justices to inquire into such a charge as is laid in the information, but they must have jurisdiction in the particular case. If there was no licence there could be no offence, and therefore no jurisdiction. The license is not produced, and *De non apparentibus et de non existentibus eadem est ratio*. I shall therefore direct the jury to return a verdict of

Not Guilty.

Attorney for prosecution, *Hand*, Stafford.

Attorney for prisoner, *Wilson*, Burton-upon-Trent.

NORTHERN CIRCUIT.

Lancaster, March 8, 1872.

(Before Mr. Justice MELLOR.)

REG. v. HOLDEN. (a)

Perjury—Materiality.

The prisoner was indicted for perjury committed by him on the hearing of a summons, which he had taken out against the prosecutor before the justices at petty sessions, for using language calculated to incite him to commit a breach of the peace. The language used by the prosecutor was in consequence of the prisoner, as the prosecutor alleged, having kicked and struck a horse, and several witnesses were called who proved this. The prisoner's attention was then called to what the witnesses had said, and he was asked on cross-examination whether it was true; he, however, denied that he had ever kicked or struck the horse, and the justices thereupon committed him for trial for perjury. Held, that no perjury could be assigned, as the statement by the prisoner that he had never kicked or struck the horse was merely collateral.

THE prisoner, Luke Holden, was indicted for perjury committed by him at the hearing of a summons before the justices at petty sessions, taken out by him against the prosecutor for using language calculated to incite him to commit a breach of the peace.

Hawthorne was for the prosecution.

The prisoner was not defended.

The prisoner, in the month of December last, took out a summons against the prosecutor before the justices at petty sessions, at Colne, in the county of Lancaster, for using language calculated to incite him to commit a breach of the peace.

From the evidence it appeared that on the 24th of December, 1871, the prisoner, who lived at Colne, and who was a saddler by trade, was removing his goods from his shop, and had hired a horse and cart for that purpose; as he was standing on the top of the cart arranging the goods the horse moved slightly, which so

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

enraged him that he jumped off the cart and kicked the horse and struck it about the head. The prosecutor, whose shop was just opposite, was standing at his door, and seeing the prisoner act thus he shouted out to him, "That is nice conduct for a religious man! If there was a society for the prevention of cruelty to animals I would summon you." Whereupon the prisoner replied, "If you don't go into your own house I will do the same to you." The prosecutor then retorted in these words: "Thou can't; thou art a squinting, lying devil." Next day the prisoner laid an information against the prosecutor for using language calculated to incite him to commit a breach of the peace; the justices heard the case and eventually dismissed the charge against the prosecutor. During the case, several witnesses were called who proved that they saw the prisoner kick and strike the horse, but the prisoner in cross-examination distinctly swore he had not done anything of the kind; the magistrates thereupon committed the prisoner to the assizes for having committed wilful and corrupt perjury, inasmuch as he had distinctly sworn that he had never kicked or struck the horse, whereas several witnesses had conclusively proved that he had.

After the case for the prosecution had been opened,

MELLOR, J., said he doubted whether perjury could be assigned on the statement made by the prisoner that he had never kicked or struck the horse, as he did not think the words were material to the issue.

Hawthorne said that as it went to the credit of the witness it was material.

MELLOR, J., said that he thought the statement by the prisoner was only collateral to the issue; he would, however, consult Mr. Justice LUSH. This he did, and, on his return into court, he said: "My brother Lush and I have considered this case; and we are of opinion that there can be no assignment of perjury; the words used were merely collateral to the issue then before the court. I may also say that we entertain no doubt about it.

Not guilty.

REG.
v.
HOLDEN.
—
1872.

Perjury—
Materiality.

NORTHERN CIRCUIT.

Manchester, March 21, 1872.

(Before Mr. Justice LUSH.)

REG. v. STEELE. (a)

Evidence—Dying declaration—Previous statement assented to by deceased when dying.

A statement made by deceased, under circumstances which would not render it admissible as a dying declaration, becomes admissible if repeated in his presence and at his request by the person to whom it was previously made, and if assented to by deceased, (presuming that he is then in such a state that if he had made a statement it would have been admissible as a dying declaration).

HANNAH STEELE was indicted for the murder of Andrew Harris, at Manchester, on the 10th of January, 1872.

Hopwood and Addison were for the prosecution.

Torr, Q.C., and Thurlow, were for the defence.

The deceased was a doctor in the Manchester workhouse, and the prisoner was a nurse there; they both had apartments in the workhouse. The case for the prosecution was, that on the morning of the 10th of January the prisoner had gone into the sitting-room of deceased before he had left his bed-room, and had put some atrophine, a very deadly poison, into his milk jug; that deceased had taken the milk with his tea at breakfast, and that shortly afterwards he complained of being unwell, and that, in spite of every effort to save him, he became comatose about two p.m., and died that evening. It was admitted by the defence that he died from the results of atrophine, and that he must have taken the atrophine in the milk. The real question was, as to whether the prisoner put it in the milk. There was nothing unusual in the fact of her going to deceased's room in the morning, as it was her duty to report to him any fresh cases that might have come in during the night; but in consequence of a conversation, when the prisoner was not present, which took

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

place between Dr. Patchett, Dr. Westmoreland, and deceased, in which he communicated to them his suspicions that it was the prisoner who had poisoned him, she was arrested, and the following evidence was given. Atrophine was given to the nurses by the doctors for the use of patients suffering from an affection of the eyes. The first witness,

Margaret Lythgoe, said: I was servant to deceased. On the 10th of January last, at half-past eight in the morning, I put the milk into a cream jug, placed it with the other things on a tray, and took it into deceased's room. As I was coming out of the room I met the prisoner, who was going towards deceased's room. About half-past nine deceased's bell rang and I went to his room, and found him at breakfast; he complained that something was wrong with the milk. I tasted it and it was very bitter. I soon afterwards became very ill.

Cross-examined: It was Mrs. Steele's duty to go to deceased's room about the time I saw her go.

Inspector Henderson was then called.—I arrested the prisoner on the 10th of January at the workhouse, and said to her, "I must take you into custody for having administered a noxious drug to Mr. Harris this morning. It is a very serious charge, and my advice to you is to say nothing at all." She replied, "I have nothing to conceal; I was in Mr. Harris's room this morning and saw him; I went to talk to him about some lunatic paupers to see if they were ready." I then said that it was in consequence of a statement made by Mr. Harris before his death that she was to be taken into custody. She said, "He must be a bad man to say anything of that kind about me."

Evidence was also given by the prosecution to prove that prisoner had a spite against deceased, and that she had endeavoured to fix the charge of poisoning the deceased upon another woman.

William Patchett said: I am assistant surgeon at the Manchester Workhouse. I went to see the deceased about half-past eleven o'clock upon the morning in question. He complained of burning pain and dryness in his throat, and other symptoms of poisoning by atrophine. He then made a statement to me. I wished to give him an emetic, but he refused. He said it was too late, the poison was absorbed. I eventually gave him two, the latter of which took effect. Mr. Westmoreland came into the room about one o'clock. Deceased was in a dying state, and he knew he was dying. When Mr. Westmoreland came in, deceased said to him, "Joe, I am poisoned;" and in a minute or two afterwards he said, "Joe, I am dying." Mr. Westmoreland said, "Oh, nonsense." Deceased replied, "But I am." I then said, "Do you suspect any one?" and deceased turned to me and said, "Tell him, Patchett;" and I then made a statement to Mr. Westmoreland. Deceased understood all that was said, and was perfectly conscious.

Torr, Q.C., objected to the statement made by deceased to Patchett being given in evidence.

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Dying
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—
*Evidence—
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LUSH, J.—The only question for me is whether the man then thought that he was about to appear in the presence of his Maker, and that death was imminent.

Torr, Q.C.—The statement to be admissible as evidence in a court of justice, must be made either under the sanction of an oath or under the sanction of an impression by the man that he was dying; and what he then says must be a saying of his own, and not something said by another in his presence to which he merely gives assent. There is no case which has ever gone so far as that. The statement which he made to Dr. Patchett at half-past eleven was not a dying declaration; it could not be received as evidence; therefore, as this statement which the prosecution wants to put in is really the same, it cannot consequently be received. The deceased may have assented when Dr. Patchett repeated the conversation to Dr. Westmoreland, but the very fact of deceased saying, "Tell him, Patchett," shows that he was then unfit himself to make a statement; and it is quite possible that he might have desired to correct the statement, when repeated, but was too ill to do so, and thus he assented to it. It must be remembered that when he assented it was at one o'clock, an hour and a half after he himself had made the statement.

LUSH, J.—I do not agree with you there. I am not aware of any such distinction as that where a man knows he has made a statement a short time before, and, instead of repeating it over again, he tells another to repeat it. It is equivalent to saying it himself. I will, however, consult my brother Mellor upon the point.

His LORDSHIP then left the court, and on his return, said: I have consulted my brother Mellor, and we are both of opinion that the statement is admissible.

Mr. Patchett was then recalled, and said: I repeated to Mr. Westmoreland what deceased had told me in the morning about half-past eleven o'clock. I said that when I went into deceased's room defendant said to me, "Patchett, my dear fellow, I am poisoned, they have put something into my milk." I said, "Where is the milk?" He said, "The servant has thrown it away." I said, "Who do you think has done it?" He said, "Mrs. Steele, I believe." He then went on to say, "As I was washing in my bedroom this morning I heard some one in my sitting room." I opened the bedroom door and saw Mrs. Steele standing there. He then pointed to a small bottle on the mantle-piece, and said, "I found this bottle there this morning. It was not there the night before, and the liquid in it smells like the milk. I sent a similar bottle to it to Mrs. Steele the night before containing a draught." After I had repeated this to Mr. Westmoreland, deceased said, "Yes, that's it; it's her."

Not Guilty.

KENT SUMMMER ASSIZES, 1872.

MAIDSTONE CROWN COURT.

March.

(Before Lord Chief Justice COCKBURN.)

REG. v. ENGLISH. (a)

False pretences—Evidence—Effect of pretences.

On an indictment for inducing the prosecutor, by means of false pretences, to enter into an agreement to take a field for the purpose of brick making, in the belief that the soil of the field was fit to make bricks, whereas it was not, he being himself a brickmaker, and having inspected the field and examined the soil :

Held that, nevertheless, if he had been induced to take the field by false and fraudulent representations by the defendant of the specific matters of fact relating to the quality and character of the soil, as, for instance, that he had himself made good bricks therefrom, the indictment would be sustained :

Held, also, that it would be sufficient if he was partly and materially, though not entirely, influenced by the false pretences.

FALSE PRETENCES. The indictment contained nine counts, most of them for inducing the prosecutor (one Bawden), by means of false pretences, to enter into an agreement to take a brick field for the purpose of making bricks. The first count alleged that the said English entered into negotiation with Bawden for the letting by the said English and the hiring by the said Bawden of a certain field belonging to English, and referred to as "the ten acre field," and that English, intending to cheat and defraud, on the 16th September, 1868, did unlawfully, knowingly, and designedly, falsely pretend to the said Bawden that the said field then was a good and profitable brick field, that the said English had made a profit of 400*l.* upon a certain clump of bricks then standing in the said field, and which had all been made from the earth of the said field mixed with marsh mud. That one Benthall, who was then upon the said field, was then willing and desirous to hire the said field from him the said

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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English. That the earth of the said field, when mixed with marsh mud, was then capable of yielding bricks as good as those in the said clump, and that he the said English had then recently been carrying on a profitable business by the manufacture of bricks from the earth of the said field, mixed with marsh mud. By means of which said false pretences the said English did then and there, with intent to defraud, unlawfully, knowingly, and fraudulently obtain of and from the said Bawden, a certain valuable security, to wit, an agreement signed by the said Bawden, in the words and figures following, that is to say (setting out an agreement by English to give a lease of the brick-field, and by Bawden to accept the same, with all usual covenants for brick-field, machinery, and plant), the machinery and plant at the yearly rent of 100*l.*, and 5*l.* per acre surface rent, and 1*s.* 3*d.* per thousand for all bricks moulded, four millions to be made each year or paid for, and as many more at 1*s.* 3*d.* per thousand as Bawden chooses; the rent to be paid quarterly, commencing on the 29th September, 1868, Bawden taking possession at once; the term to be seven years. Whereas, in truth and in fact, the said field was not then a good or profitable brick-field. And, whereas, in truth and fact, the said English had not made a profit of 400*l.*, as he so falsely pretended as aforesaid upon the said clump of bricks then standing and being in the said field. And, whereas, the said bricks in the said clump of bricks standing in the said field had not been all made from the earth of the said field mixed with marsh mud. And, whereas, the said Benthall, who was upon the said field when the said English so falsely pretended as aforesaid, was not then willing or desirous to hire the said field from him the said English, and whereas the earth of the said field, when mixed with marsh mud, was not then, as the said English knew, capable of yielding bricks as good as those in the said clump. And, whereas, the said English had not then recently been carrying on a profitable business by the manufacture of bricks from the earth of the said field, mixed with marsh mud, as he so falsely pretended as aforesaid. Other counts stated the charge substantially in the same way.

M. Chambers, Prentice, and Willis, for the prosecution.

Parry, Serjt., Sleigh, and Joyce, for the defence.

The prosecutor was a brickmaker, and in consequence of an advertisement issued by the defendant went down to see the field, and was shown over it, and inspected the earth and soil of the field, and also examined a clump of bricks upon the field, said to have been made out of the earth and soil of the field; but evidence was given of the specific false pretences alleged, and he swore he was induced by means of these representations, and in the belief that they were true, to enter into the agreement. And evidence was given also to show that they were to the knowledge of the defendant false, and intended to deceive and defraud. It was further sworn by the prosecutor and his witnesses that the bricks shown to him as made from the soil of

the field had in fact been made from other earth, as known to the defendant.

The case had been previously tried before Bramwell, B., when the jury were discharged.

At the close of the case,

COCKBURN, C. J. (Bramwell, B., having previously directed the jury in the same way).—There is a case for the jury on the counts which charge that the prosecutor, by means of the false pretences, was induced to enter into the agreement. The jury must be satisfied, however, not only that the pretences were false and fraudulent, but that the prosecutor was induced by means of them to enter into the agreement. The prosecutor, it is true, was a brickmaker, and examined the soil of the field; but the charge is that false and fraudulent representations were made to him of specific matters of fact which would be material in influencing his judgment; and if that were so, the indictment would be sustained.

The jury, after long consideration, said that they found the pretences false and fraudulent, but that the prosecutor was not influenced solely by means of the pretences.

COCKBURN, C. J.—That finding is not sufficient. Was he partly influenced by them? that is, did they materially affect his judgment?

The jury said they did; they turned the balance, so to speak, in his mind.

COCKBURN, C. J.—Then that is sufficient to sustain the indictment, and a verdict must be entered of

Guilty.(a)

(a) A point was reserved, whether the agreement, being for seven years and not under seal, could be described as a valuable security.

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LEEDS SPRING ASSIZES.

April 3, 1872.

(Before Mr. Justice QUAIN.)

REG. v. HILLAM. (a)

Bankruptcy—Evidence—Bankrupt's depositions.

The Bankruptcy Act, 1869, is so far analogous to the Bankruptcy Act, 1849, that the Courts of Bankruptcy have power to compel bankrupts to give answers to questions criminating themselves, and, therefore, on the authority of Reg. v. Scott (7 Oor O. O. 164), such answers are admissible in evidence against the bankrupt in a criminal prosecution.

THE prisoner, Joseph Garside Hillam, was indicted for various offences against the Debtors Act, 1869, and, amongst others, in the following count:—

5. And the jurors aforesaid, upon their oath aforesaid, do further present that Joseph Garside Hillam was, on the 26th day of May, 1871, duly adjudged bankrupt, and within four months next before the presentation of the bankruptcy petition against him, he, being a trader, disposed of, otherwise than in the ordinary way of his trade, certain property which he had before then obtained on credit, and had not paid for, against the form of the statute in such case made and provided, and against, &c.

It was proved that the prisoner had been duly adjudicated bankrupt; and, for the purpose of proving the offence charged, it was proposed to put in the deposition of the bankrupt taken before the County Court of Bradford, in which the bankruptcy proceedings had taken place. It was proved that the prisoner had, in pursuance of an application made by the trustee, been summoned, and had appeared before the county court; and that he had been examined before the county court judge by the attorney conducting the bankruptcy proceedings, and that the statement made in the course of that examination had been taken down in shorthand by a shorthand writer duly appointed under rule 207 of the Bankruptcy Rules of 1869. The shorthand writer

(a) Reported by J. P. ASPINALL, Barrister-at-Law.

was called, and produced his original shorthand notes, and proved that the transcript, which was upon the file of the bankruptcy proceedings, and which was duly sealed with the seal of the Bradford County Court, was a correct transcript of the statement made by the prisoner in his examination. The deposition was not signed by the prisoner.

Price, Q.C., and *Mellor*, for the Crown, tendered the deposition in evidence.

Waddy (*Wilberforce* with him), for the prisoner, objected to the admissibility of the deposition. It is a rule that no man is bound to criminate himself, and that which is forced from him cannot be given in evidence against him. It was decided in *Reg. v. Scott* (7 Cox C. C. 164), under the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 103), s. 117(a), that a deposition made by a bankrupt could be given in evidence against him in criminal proceedings. But that section is repealed, and the common law is now in force, under which such depositions are not evidence. That depositions, taken under the Bankruptcy Act, 1869, are not evidence in such cases is clear from sect. 108 of that Act, which is the only section which makes depositions evidence, and then only when a witness is dead. The new Act differs also from the old in that the depositions are not now signed, whereas under the old Act they were signed by the bankrupt. The sections of the new Act under which a bankrupt is examined by the court are not at all analogous to sect. 117 of the Bankruptcy Act, 1849, as they do not expressly give the court power to examine a bankrupt with a view to disclose criminal acts.

Price, Q.C., *contra*.—Sect. 108 of the Bankruptcy Act, 1869, is introduced into the Act for the purpose of enabling trustees to bring actions in cases of fraudulent preferences, and does not apply to proceedings against a bankrupt, as such a provision would be useless if he were dead. Sect. 107 really governs the admission of evidence, and that enacts that “any instrument or copy of an instrument, affidavit, or document, made or used in any bankruptcy proceedings or other proceedings under this Act may, if any such instrument as aforesaid, or copy of an instrument, appears to be sealed with the seal of any court having jurisdiction, or purports to be signed by any judge having jurisdiction in bankruptcy under this Act, be receivable in evidence

(a) That section enacted “That the court may summon any bankrupt before it, whether such bankrupt shall have obtained his certificate or not; and in case he shall not come at the time appointed by the court, it shall be lawful for the court, by warrant, to authorise and direct any person or persons the court shall think fit, to apprehend and arrest such bankrupt, and bring him before the court; and upon the appearance of such bankrupt, or if such bankrupt be present at any sitting of the court, it shall be lawful for the court to examine such bankrupt after he shall have made and signed the declaration contained in the schedule (W.) to this Act annexed, either by word of mouth or on interrogatories in writing, touching all matters relating to his trade, dealings, or estate; or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination so reduced into writing the said bankrupt shall sign and subscribe.”

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in all legal proceedings whatever.” This is an instrument duly sealed by the court. The real question is whether the Court of Bankruptcy had power to examine this man, and to extract from him admissions as to his criminality. In *Reg. v. Scott (supra)* the judges held that as the statute made such a proceeding legal, the evidence was admissible. Power is given to the county courts to examine bankrupts by the Bankruptcy Act, 1869, ss. 19 and 96(a), and these sections give full power to compel the answering of even criminating questions. The principles laid down in *Reg. v. Scott (supra)* are equally applicable to the present Act.

QUAIN, J.—I shall certainly admit this deposition in evidence. It is clearly an admission by the prisoner, and the only question is whether the county court had power to force the prisoner to make admissions which would criminate himself. It seems to me that the two statutes are analogous. Sects. 19, 96, and 97 of the Bankruptcy Act, 1869, give power to summon and to examine the bankrupt as to all matters concerning his affairs, and, as it appears to me, it is essential for the administration of the bankruptcy laws that the court should have power to compel answers to criminating questions, and these sections clearly give such a power. That proposition once established, the law laid down in *Reg. v. Scott* applies, and these depositions are therefore evidence, and I shall admit them.

The depositions of the bankrupt were then read, and from

(a) Bankruptcy Act, 1869, sect. 19: “The bankrupt shall, to the utmost of his power, aid in the realization of his property, and the distribution of the proceeds amongst his creditors. He shall produce a statement of his affairs to the first meeting of creditors, and shall be publicly examined thereon on a day to be named by the court, and subject to such adjourned public examination as the court may direct. He shall give such inventory of his property, such list of his creditors and debtors, and of debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such meetings of his creditors, wait at such time on the trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors as may be reasonably required by the trustee, or may be prescribed by rules of court, or be directed by the court by any special order or orders made in reference to any particular bankruptcy, or made on the occasion of any special application by the trustee or any creditor. If the bankrupt wilfully fail to perform the duties imposed on him by this section . . . he shall, in addition to any other punishment to which he may be subject, be guilty of a contempt of court, and may be punished accordingly.”

Sect. 96: “The court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the court may deem capable of giving information respecting the bankrupt, his trade, dealings, or property, and the court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings, or property; and if any person so summoned, after having been tendered a reasonable sum, refuses to come before the court at the time appointed, or refuses to produce such documents, having no lawful impediment made known to the court at the time of its sitting and allowed by it, the court may, by warrant addressed as aforesaid, cause such person to be apprehended and brought up for examination.”

Sect. 97: “The court may examine upon oath, either by word of mouth or by written interrogatories, any person so brought before it in manner aforesaid, concerning the bankrupt, his dealings, or property.”

them it appeared that certain transactions of the bankrupt were out of the ordinary course of his business, and the question was left to the jury whether they were satisfied or not that the prisoner had no intent to defraud.

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Verdict, Guilty. Sentence, two years hard labour.

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Attorneys for the prosecution, *Terry and Robinson*, Bradford.
Attorneys for the prisoner, *Watson and Dickons*, Bradford.

NORFOLK CIRCUIT.

HUNTINGDON SPRING ASSIZES, 1872.

(Before Lord Chief Baron KELLY.)

REG v. PAMENTER.(a)

Admission by a prisoner—Letter written by him and not sent to its destination rejected.

The prisoner was taken into custody for stealing from a dwelling-house, and when in the police station wrote two letters, one to his wife and the other to a friend. The prisoner was told that all letters would be read before being despatched, and the letter in question was detained and a copy sent to its destination.

Held, per Kelly, C.B., that the original addressed to the prisoner's wife was not admissible.

JAMES PAMENTER, a police constable, was indicted for stealing from a dwelling-house.

Cockerell for the prosecution.

Naylor and Gaches for the prisoner.

Police-constable Stubbings produced three letters, written by the prisoner. He deposed that when in custody the prisoner was told that all letters written by him would be read before going out of the station. Prisoner after that caution asked the witness to post a letter unbeknown to the superintendent, and gave him three letters: one addressed to Mr. W. Giles, police-officer, Farcet, near Peterborough; one addressed to Mr. W. D. Gaches, attorney to the prisoner; and a third addressed to prisoner's wife.

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

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Cockerell proposed to put in the letters to Giles and the prisoner's wife.

Naylor objected to the latter upon the ground that as prisoner's wife was an incompetent witness, so the letter the moment it left the prisoner became the property of the wife, and could only be produced by her; and, further, it was obtained from the prisoner by a promise, he understanding that it would not be read.

KELLY, C.B.—This letter is not the same as a statement. The letter was not obtained under a promise, the constable only said, "I will see."

Gaches.—That expression would influence him.

KELLY, C.B.—The first letter was received without objection. I do not think there was any undue influence.

Naylor.—I object merely to the one addressed to the wife. It was merely delivered to the constable as agent to the prisoner to put into the post, and he ought to have done so; and if he had, it would be clear that a copy would not be admissible, for if the original reached the wife she could not produce it, and being in existence, secondary evidence would be inadmissible.

Cockerell.—Assuming the letter to have been posted, I admit the evidence would not be admissible; but it was never out of the hands of the person whom the prisoner had made his agent, and the possession of the agent was the possession of the prisoner.

KELLY, C.B., upon consideration, said, I shall not receive in evidence the letter addressed to the wife. I am by no means certain that the objection is not valid.

The prisoner, upon other evidence, was found

Guilty.

COURT OF CRIMINAL APPEAL.

April 27th, 1872.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE and QUAIN, JJ.)

REG. v. REEVE AND ANOTHER. (a)

Evidence—Confession—Inducement—Admissibility.

Two little boys were in custody on suspicion of obstructing a railway train, and the mothers and a policeman were also present. One of the boys' mothers said "You had better, as good boys, tell the truth." Whereupon, both the boys confessed. Upon the trial, they were convicted upon evidence of that confession. Held, that the evidence of confession was rightly received.

CASE reserved for the opinion of this Court by Byles, J.

The prisoners were children. One was eight years of age, and the other a little older. They were convicted at the Worcester Assizes of an attempt to commit a misdemeanour, by obstructing a railway train.

The evidence was that Hancock's mother, Reeves' mother, and a policeman being present after they had been apprehended on suspicion, Mrs. Hancock said, "You had better as good boys, tell the truth;" whereupon, both the prisoners confessed, and on this confession were both convicted.

The question for the Court of Criminal Appeal is whether the confession was admissible against both the prisoners or either.

No counsel argued for the prisoners.

Streeten for the prosecution.—The evidence of the confession was properly received. The inducement to the prisoners to tell the truth was in the nature of an admonition and an exhortation, and was not in the nature of improper influence to procure a confession. This case is not so strong as *Reg. v. Jarvis* (10 Cox C. C. 574), where one of the prisoner's employers having called the prisoner into his private room said, "I think it right that I should tell you that besides being in the presence of my brother and myself, you are in the presence of two police officers; and I should advise you that to any questions that may be put to you, you answer truthfully, so that if you have com-

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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mitted a fault you may not add to it by stating what is untrue ;” and having shown a letter to him which he denied having written, added, “ Take care, we know more than you think we know,” and the prisoner thereupon made a confession which was held admissible. [He was then stopped.]

KELLY, C.B.—We need not trouble you any further. The cases excluding confessions on the ground of unlawful inducement have gone too far for the protection of guilt. The case of *Reg. v. Jarvis* was much stronger in its circumstances than the present. In that case a good deal was said by one of the prosecutors that might have operated on the prisoner’s mind, and led him to confess. In the present case, the inducement was simply what a mother would say to her son under the circumstances.

The rest of the Court concurring,

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

April 27, 1872.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE and QUAIN, JJ.)

REG. v. WOLLASTON. (a)

Indecent assault—Consent.

A man induced two youths above the age of fourteen years to go with him in the evening to an out-of-the-way place, where they mutually indulged in indecent practices on each others’ persons. The youths were willing and assenting parties to what was done: Held, that under these circumstances a conviction for an indecent assault could not be upheld.

CASE reserved for the opinion of this Court by Cockburn, C.J.

Thelwall Wollaston was tried before me, at the last Assizes for the county of Sussex, on an indictment under the 24 & 25 Vict. c. 100, s. 62, for an indecent assault on one William Rickard with intent to incite the said William Rickard to commit an unnatural crime. There was a similar count for an assault, with the like intent on one Douglas White.

There were also (besides other counts which altogether failed

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

on the evidence) counts for an indecent assault on each of the two parties before named.

The facts did not admit of dispute. It appeared that the defendant had induced two youths, William Rickard and Douglas White, by the expectation of pecuniary reward, to go out with him in the evening to an out-of-the-way place, and had, &c. (The facts showing the indecency practised were then set out.) After having passed some time in the gratification of this unnatural propensity, he, without attempting or suggesting anything further, voluntarily left, not having been interrupted or become conscious of being observed. It was plain that the two youths had accompanied the defendant with a full knowledge of what was about to take place—this not being the first time that the defendant had carried on such practices with one of them—and had been perfectly willing and assenting parties to all that had been done.

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There being thus no evidence to establish the intent necessary to support the counts framed on the statute, the counsel for the prosecution very properly gave up that part of the case and relied for a conviction on the counts for the indecent assault. But on the part of the defendant it was contended that, as it was admitted that the parties on whom the alleged assault had been made had been consenting to all that had been done to them, that which would otherwise have been an assault became divested of that character; that this was not a mere submission, which, it was true, might not make a touching of the person less an assault, but an actual consent, knowingly and intentionally given, which was inconsistent with the essential character at law of an assault, and that in this respect there could be no difference in point of principle between an assault committed in furtherance of a natural desire, and one committed in furtherance of a lust however unnatural and detestable.

In support of the general doctrine that where there is consent there cannot be an assault in point of law, the case of *Reg. v. Martin* (2 Moo. C. C. 123) was referred to. The case appeared to me to be in point, and on the whole I was disposed to think that the contention of the defendant's counsel was well founded. But as the point had never been decided in a case like the present, I directed the jury to find the defendant guilty on the counts for indecent assault, reserving for the consideration of this court whether upon the facts of the case those counts could be upheld. Upon this point I now request the opinion of the Court.

I admitted the defendant to bail, to come up for judgment, if required, at the next Sussex Assizes.

Parry, Serjt. (*R. E. Webster* with him) for the prisoner.—The conviction cannot be sustained. The indictment is framed upon the 24 & 25 Vict. c. 100, s. 62, which enacts that whosoever shall be guilty of any indecent assault upon any male person shall be guilty of a misdemeanour. There was no evidence to support the finding of the jury on the fifth and sixth counts of the indictment,

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the counts for an indecent assault. The charge is one at common law, and in substance for a common assault—the offence of an indecent assault being statutable. There is no allegation of *ad commune nocumentum*, and no charge of indecent exposure. [WILLES, J. referred to *Reg. v Watson* (2 Cox C.C. 376), where an indictment which alleged an exposure of the person to one person only was held bad.] There was nothing of the kind here to constitute an exposure. [KELLY, C. B.—The only question is whether this can be called an assault at all? What was done was done not only with the consent of the youths, but they were willing participators. Of what age were the youths?] Above the age of fourteen. [He was then stopped by the Court.]

Barrow, for the prosecution.—The case of *Reg. v. Martin*, relied upon at the trial, was no doubt a decision to the effect that an attempt to commit the misdemeanour of having carnal knowledge of a girl between ten and twelve years old is not an assault if the girl assent. But in such a case it is no offence in law on the part of the girl to give her consent. The old cases establish that where two people meet to commit that which is an offence in the eye of the law, consent is immaterial. In such cases the indictment charges that each committed an assault upon the other, and that seems to show that when an indecent assault is charged to which the patient offers no opposition his consent goes for nothing, and that the law will not regard it: (*Lord Audley's case*, 3 Howell's St. Trials, 402.) [WILLES, J.—In an action for criminal conversation the declaration alleges that the defendant assaulted the wife though she was a consenting party.] An indecent assault is an act to which the law will not permit a party to consent.

KELLY, C.B.—It is clear that, upon the circumstances of the case, there is nothing which constitutes an assault in law. If anything is done by one being upon the person of another, to make the act an assault, it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case there was actual participation by both parties in the act done, and complete mutuality. We should be overturning all the principles of law to say that in this case there was any assault in law. The cases referred to in the argument of the counsel for the prosecution are founded on this, that the law does not recognise consent to commit a felony. In this case there is nothing in the nature of an exposure of the person charged which is within the purview of the law. Anything of the kind in question done before two or more persons would have amounted to an indecent exposure, and consent would have been no defence. Consequently, under the circumstances of this case, the conviction must be quashed.

The rest of the Court concurring.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

April 27, 1872.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE, J., and
QUAIN, J.)

REG. v. BEAUMONT.

Misdemeanor—Bankruptcy—Evidence—32 & 33 Vict. c. 62, s. 11.

A debtor whose affairs were liquidated by arrangement, was indicted under 32 & 33 Vict. c. 62, s. 11, for that he knowing that false debts had been proved under the liquidation, failed for the period of a month to inform B., the trustee, thereof.

The evidence was that the debtor, on the 23rd of September, 1870, filed his petition in the county court, alleging that he was unable to pay his debts, and that he was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors; that on the 10th of October, the first meeting under the petition was held, and three false debts proved with his connivance. At the first meeting of the creditors, it was resolved that a composition of 8s. in the pound, payable by instalments, and to be secured, should be accepted, and B. was appointed trustee in the matter. On the 12th of October, the Registrar of the County Court certified that B. was appointed trustee, and was declared to be trustee under the liquidation by arrangement. At the second meeting of creditors on 19th October, it was resolved that the debtors' affairs should be liquidated by arrangement, and not in bankruptcy; that the remuneration of the trustee (B.) be left to a subsequent meeting, and that the trustee should pay the moneys received by him into the H. bank:

Held, that upon the evidence, B. was proved to be the trustee under the liquidation by arrangement, notwithstanding that at the first meeting, when he was originally appointed, it was resolved to accept a composition of 8s., and nothing was then resolved as to a liquidation by arrangement.

CASE reserved for the opinion of this Court by Mr. Justice Quain.

Samuel Beaumont was convicted of a misdemeanour at the

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Spring Assizes for the West Riding of the county of York, holden at Leeds on the 21st March, 1872.

The prisoner was indicted under the Debtors' Act, 1869, sect. 11, sub-sect. 7, for that he, knowing that "certain false debts had been proved by certain persons under his liquidation, failed, for the period of a month, to inform his trustee thereof" contrary to the statute.

On the 23rd of September, 1870, the prisoner presented a petition to the County Court of Yorkshire holden at Bradford, under sects. 125 and 126 of the Bankruptcy Act, 1869, and in the form No. 106 appended to the general rules in bankruptcy stating his desire to institute proceedings for the liquidation of his affairs by "arrangement or composition" with his creditors.

The first meeting under the said petition was held on the 10th October, 1870. The petitioner was present at the meeting. At this meeting divers debts were proved in the usual way by affidavit, and amongst other debts three persons formerly workmen in the employment of the prisoner proved debts to the amount of 10*l.*, 9*l.* 12*s.*, and 8*l.* 10*s.* respectively for wages alleged to be due to them from the prisoner. It was proved before me that these proofs had been obtained by the prisoner from the workmen who were induced by the prisoner to make them, the prisoner and the deponents well knowing that the amounts of the debts sworn to in these proofs were considerably beyond what was due to the deponents respectively.

In one case only 5*s.* 8*d.* was due to the deponent instead of 9*l.* 12*s.* the sum sworn to in his affidavit.

It was further proved that the prisoner furnished each of the three workmen with fictitious particulars of the claims, and directed them to copy those particulars and send them in to the trustee when demanded, and this direction was obeyed by the three deponents respectively.

The prisoner's attorney was appointed proxy by each of the deponents to vote for each of them at all meetings of creditors.

At the first meeting of creditors the following resolutions were passed by the statutory majority :

1. That a composition of 8*s.* in the pound shall be accepted in satisfaction of the debts due to the creditors from the said Samuel Beaumont.

2. That such composition be payable as follows, by three equal instalments, at four, eight, and twelve months from this date.

3. That the said composition be secured to the satisfaction of Messrs. Isaac Faulkner Oates and Ephraim Gibson.

4. That Charles Joseph Buckley be appointed trustee in the matter.

5. That the second general meeting of creditors be held at the Royal Hotel, in Cleckheaton.

On the 12th of October, 1870, the registrar of the said County Court certified that the said Charles Joseph Buckley had been appointed trustee, and he was thereby declared to be trustee

"under this liquidation by arrangement." The certificate was in the form number 121, appended to the General Rules in Bankruptcy.

The prisoner's attorney, as proxy for the above three creditors, voted for these resolutions, and these creditors were reckoned in the majority in value.

The second meeting of creditors was held on the 19th October, 1870.

The petitioner was present at this meeting, and the following resolutions were passed unanimously:—

1. We, the undersigned, being the statutory majority of creditors assembled at the second meeting in the above matter, duly held at the Royal Hotel, in Cleckheaton aforesaid, this 19th of October, 1870, in accordance with the provisions of the said Act, do hereby resolve that the affairs of the said Samuel Beaumont be liquidated by arrangement and not in bankruptcy.

2. That Messrs. William Stead, Ephraim Gibson, and John Rhodes Cordingley be appointed a committee of inspection.

3. That the remuneration of the trustee (Mr. Charles Joseph Buckley) be left to a subsequent general meeting.

4. That the trustee (Mr. Charles Joseph Buckley), shall pay all sums of money on account of the estate from time to time received by him into the Huddersfield Banking Company's branch bank at Cleckheaton.

No debts were proved at the second meeting, but the creditors voted at the second meeting in respect of the debts proved at the first meeting, which proofs were on the file of the court.

The prisoner's attorney voted as proxy for the above three creditors at the second meeting in the same way as he did at the first.

There was no fresh express appointment of a trustee at the second meeting beyond what is contained in the above last-mentioned resolution, nor was there any fresh certificate of the registrar given after the second meeting in respect of the appointment of trustee.

The proceedings of a second meeting professed to be regulated by rules 282 and 283 of the General Rules in Bankruptcy.

After the second meeting the trustee, Charles Joseph Buckley, proceeded to act as trustee under the liquidation; he collected the assets, and he had paid at the time of the trial a dividend of 4s. in the pound. He treated the debts alleged to be due to the three above-mentioned creditors for wages as preferential debts, and paid them in full by cheque.

The said creditors immediately handed over the cheques to the prisoner, who got them cashed, and then paid over to the three creditors the sums really due to them, and appropriated the rest of the money to his own use.

On these facts it was contended for the prisoner that he could not be convicted of an offence under the Debtors Act, 1869, sect. 11, sub-sect. 7, inasmuch as the liquidation by composition

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having been changed by the resolutions passed at the second meeting into a liquidation by arrangement, no debts had been legally proved under the liquidation by arrangement, nor had any trustee been legally appointed under that liquidation; that the trustee appointed on the 10th of October was appointed the trustee under the liquidation by composition only in pursuance of Rule 279, and that the powers and functions of such a trustee are entirely different from those of a trustee duly appointed under a liquidation by arrangement, according to the provisions of sect. 125, sub-sects. 1, 5, and 7, of the Bankrupt Act, 1869.

On the other hand, it was contended by the counsel for the prosecution that the liquidation, though changed at the second meeting from a liquidation by composition into a liquidation by arrangement, in pursuance of Rule 283, continued to be in effect the same liquidation, and that the creditors who voted at the second meeting were entitled to vote in respect of their debts proved at the first meeting, and were not under the necessity of proving those debts a second time, and that the trustee appointed at the first meeting became the trustee under the resolution passed at the second meeting, and was impliedly, if not expressly, recognised as such trustee under those resolutions, and that the petitioner having been present at the said meeting, and having used by his attorney the proofs of debts made at the first meeting, could not object that the proceedings at the second meeting were irregular in that respect.

The jury convicted the prisoner of knowing that the above three false debts had been proved under the liquidation, and that he failed for the period of a month to inform the trustee thereof.

I reserved for the opinion of this Court the question whether, on the above facts, the prisoner could be convicted of the offence charged against him.

Copies of the petition of the proceedings at both meetings of creditors, and of the certificate of the registrar of the appointment of the trustee as entered on the file of the Court as below, were annexed to the case.

“THE BANKRUPTCY ACT, 1869.—In the County Court of Yorkshire holden at Bradford.—The humble petition of Samuel Beaumont, of Cleckheaton, in the county of York, machine maker.

“Showeth.—That your petitioner alleges that he is unable to pay his debts, and is desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors, and hereby submits to the jurisdiction of this Court in the manner of such proceedings, and that your petitioner estimates the amount of the debts owing by him to his creditors at 2500*l*.

“That your petitioner does not reside or carry on business within the district of the London Bankruptcy Court.

“Your petitioner therefore prays that notice convening such general meeting, or meetings of his creditors, as may be necessary to be given by him during the course of such proceedings,

may be sent in the prescribed manner, and that such resolution or resolutions as his creditors may lawfully pass in the course of such proceedings, and as may require registration, may be duly registered by the registrar of the Court. And your petitioner shall ever pray, &c.

“(Signed) SAML. BEAUMONT.

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“Signed by the petitioner, Samuel Beaumont, on the 23rd of September, 1870, in the presence of

“(Signed) Jas. G. Hutchinson, Attorney-at-Law, Piccadilly Chambers, Piccadilly, Bradford, aforesaid.

“THE BANKRUPTCY ACT, 1869.—In the County Court of Yorkshire, holden at Bradford.—In the matter of a special resolution for liquidation by arrangement of the affairs of Samuel Beaumont, of Cleckheaton, in the county of York, machine maker. This is to certify that Charles Joseph Buckley, of Bradford aforesaid, accountant, has been appointed, and is hereby declared to be, trustee under this liquidation by arrangement.

“Given under my hand and the seal of the Court this 12th day of October, 1870.

“(Signed) GEO. ROBINSON, Registrar.

“County Court of Yorkshire, holden at Bradford,

“Filed, 12th of October, 1870.

“(Signed) J. R. QUAIN.”

Waddy (*Wilberforce* with him) for the prisoner.—The offence charged was created by the Debtors' Act, 1869 (32 & 33 Vict. c. 62, s. 11): “Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall in each of the cases following be deemed guilty of a misdemeanor;” and then sub-sect. 7: “If knowing or believing that a false debt has been proved by any person under the bankruptcy or liquidation, he fail for the period of a month to inform such trustee as aforesaid thereof.” Then the mode of appointing the trustee in cases of liquidation by arrangement is regulated by sect. 125 of the 32 & 33 Vict. c. 71 (the Bankruptcy Act). Two points arise, first, no false debts were proved in such a way that it was incumbent on the defendant to give the trustee notice thereof; and secondly, there was no trustee properly appointed that it was his duty to acquaint of such false debts. The Bankruptcy Act contemplates two modes of proceeding for winding-up the estate, first, by composition; secondly, by liquidation by arrangement. Rule 279 is: “Where the creditors at the first general meeting duly pass a resolution that a composition shall be accepted in satisfaction of the debts due to them from the debtor, they shall specify in their resolution the amount of the composition and the instalments and dates at which the same shall be payable, and they may

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name some person as trustee for receipt and distribution of the composition, and any negotiable securities which may be given for the same." That is the only rule in which the trustee is mentioned. Then how stands the matter? On the 10th of October the first meeting was held, and debts proved, and a resolution passed to accept a composition of 8s. in the pound, and that Buckley be appointed trustee in the matter. On the 12th Buckley was certified by the court as the trustee, and on the 19th, at a meeting of creditors, it was resolved to liquidate the defendant's affairs by arrangement, and not in bankruptcy. The proceedings of the meeting on the 10th were rendered a nullity by those of the meeting on the 19th, the composition being changed into a liquidation by arrangement. The certificate of the registrar of the County Court was obtained on a misrepresentation of the nature of the meeting on the 10th of October. [CLEASBY, B.—Sect. 125, sub-sect. 6, and sect. 18 of the Bankruptcy Act, make the certificate conclusive evidence of the appointment of the trustee.] But in this case there was no resolution then existing to liquidate by arrangement. [WILLES, J.—Buckley was appointed "trustee in the matter," whatever turn it might take—that is, although it might be turned from what it then was, a composition, into a liquidation by arrangement. QUAIN, J.—It was so changed because the creditors were not satisfied with the security for the composition.] The certificate could not be retrospective; and as there was no liquidation by arrangement before the 19th there could be no trustee under it before then. The certificate on the 12th does not therefore avail. The false debts being proved at a meeting which became null, and no trustee being properly appointed for the liquidation by arrangement, the charge in the indictment was not legally established, and the conviction cannot be sustained.

T. Campbell Foster for the prosecution, was not called upon to argue.

KELLY, C.B.—We are all of opinion that the conviction must be affirmed. I do not say, speaking for myself, that my mind is free from difficulty as to whether some proceeding which ought to have taken place may not have done so, and not been recorded. The charge against the defendant was that he, knowing that false debts had been proved, did not give the trustee notice thereof, and the facts were that certain debts were proved under a proceeding which, if not at the particular time such, became subsequently a liquidation by arrangement. and the defendant knew that such debts were false ones, and failed to inform Buckley, the trustee, thereof, and upon proof of those facts the offence was complete. For the defendant it was argued that, looking at the date of the proof of the debts and appointment of trustee, there was then no resolution by the creditors to liquidate the petitioning debtor's affairs by arrangement, but only to accept a composition, to be paid in a certain time, and that the trustee being appointed

before it was resolved to liquidate by arrangement, there was legally no trustee at all. We must, however, look at the proceedings in their order: first, the defendant presented a petition to the County Court, wherein he alleged that he was unable to pay his debts, and was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition, and thereby submitted to the jurisdiction of the Court in the matter of such proceedings. That was, in substance, a petition for the liquidation of his affairs by arrangement or composition. Then a meeting of his creditors was held on the 10th of October, when a resolution was passed "that Charles Joseph Buckley be appointed trustee in the matter," which I read as in the matter of the petition of the defendant for liquidation of his affairs by arrangement or composition. Then again, on the 19th of October, in the very matter of this petition, a creditors' meeting was held, and by the requisite majority it was resolved that the affairs of the defendant be liquidated by arrangement and not in bankruptcy, and that the remuneration of the trustee (Mr. C. J. Buckley) be left to a subsequent general meeting, and that the trustee (Mr. C. J. Buckley) shall pay all sums of money on account of the estate, from time to time received by him into the Huddersfield Banking Company's Branch Bank at Cleckheaton. That was a clear recognition and treating of Buckley as trustee by the creditors, and a continuation and confirmation of his appointment both prospectively (and retrospectively, as I think), Buckley then being appointed by resolution of the creditors, trustee in the liquidation of the defendant's affairs by arrangement. We have next the certificate of the registrar of his appointment in the form provided by the statute, which is clear proof that Buckley was duly appointed trustee in the liquidation founded on the petition before the County Court. It was next said that the date of the certificate was the 12th of October, a week before the 19th of October, when the meeting of creditors was held, at which it was resolved to liquidate by arrangement. If those dates are to be taken as conclusive, there might be a difficulty, but not an insuperable one, because we have only to say in answer that the resolutions at the meeting on the 19th have a retrospective operation. It is, however, unnecessary to consider that question, because the three requisites were proved to complete the case. First, there is the petition praying for a liquidation of his affairs by arrangement or composition; secondly, there was a meeting of creditors under that petition, at which Buckley was appointed trustee; thirdly, there was another meeting at which it was resolved to liquidate his affairs by arrangement; and, finally, there was the certificate of the trustee's (Buckley) appointment, and the matter of the special resolution for liquidation by arrangement of the affairs of the defendant. Sect. 18 of the Bankruptcy Act makes that certificate conclusive evidence of the appointment of the trustee; and we cannot, therefore, look at the dates. Without referring to the dates the proceedings

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are such as to establish a liquidation by arrangement, and the appointment of the trustee. The conviction, therefore, must be affirmed.

The rest of the Court concurring,

Conviction affirmed.

Attorneys for the prosecution, *Terry and Robinson*, Bradford.
Attorney for the petitioner, *Kerry*, Bradford.

COURT OF CRIMINAL APPEAL.

April 27 and May 4, 1872.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE, J., and
QUAIN, J.)

REG. v. REA.(a)

Bigamy—Marriage before registrar—Misnomer.

In 1866, the prisoner married, and in 1872, whilst his wife was living, he married another woman in the presence of the registrar of marriages, describing himself, not as Edward Rea, his true name, but as Benjamin Rea. It did not appear whether or not the second wife at the time of the marriage knew that prisoner's name was misdescribed :

Held, that the prisoner was guilty of bigamy.

Quære, whether he would have been guilty of bigamy if both parties had known of the misnomer.

CASE reserved for the opinion of this Court by Byles, J.

The prisoner was indicted at Shrewsbury Assizes for bigamy.

He was married in 1866 by the name of Edward Rea to his first wife now living, who refused to cohabit with him, and told him he might go and marry any other woman.

In 1872 he accordingly married another woman, in the presence of the registrar, describing himself, not as Edward Rea, his true name, but as Benjamin Rea.

There was no evidence to show whether the second wife, at the time of her marriage, knew, or did not know, that his Christian name was misdescribed.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

He was convicted of bigamy, subject to the opinion of the Court of Criminal Appeal, whether on these facts the felony was proved.

April 27.—No counsel appeared to argue on either side. The Court took time to consider its judgment.

May 4.—KELLY, C.B. now delivered the judgment of the Court. —This case must be decided upon the same principle as applies to the case of a marriage by banns, because the language of the statute for marriages by a registrar (6 & 7 Will. 4, c. 85, ss. 4 and 42), follows the provisions as to banns, and ought to receive the same construction. As to banns it is clear that to render a marriage invalid it must be contracted with a knowledge by both parties that no due publication of banns has taken place: (*Rex v. The Inhabitants of Wroxton*, 4 B. & Ad. 640; *Tongue v. Tongue*, 1 Moore P. C. 90.) In this case the man only appears to have known of the misnomer, and the presumption in favour of marriage and against fraud clearly threw the burden of proof of invalidity upon the party alleging it. This was assumed in *Tongue v. Tongue*, otherwise the statement of Baron Parke's dissent would have been superfluous. Therefore without saying that if both parties knew of the misnomer, there would have been no offence of bigamy against the statute, the conviction ought to be affirmed.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

April 27 and May 4, 1872.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE, J., and QUAIN, J.)

REG. v. WILLIS.(a)

*Penal servitude—Previous conviction—Sentence—Amendment—
11 & 12 Vict. c. 78, s. 2; 27 & 28 Vict. c. 47, s. 2.**Upon an indictment for wounding with intent to do grievous bodily harm, which did not charge a previous conviction for felony, the prisoner was convicted and sentenced to seven years' penal servitude, the learned judge reserving for this Court the question whether he had power to sentence for a greater term than five years (27 & 28 Vict. c. 47, s. 2), the sentence to stand or be reduced to five years as this Court should determine:**Held, that the sentence ought to be reduced to five years' penal servitude, and the sentence amended accordingly (11 & 12 Vict. c. 78, s. 2.)*

CASE reserved for the opinion of this Court by Bramwell, B.

This case was tried before me at the last Assizes for the city of Exeter.

It was an indictment for wounding with intent to do grievous bodily harm, and the prisoner was found guilty of unlawfully wounding.

It was proved, though not stated in the indictment, that he had been before convicted of felony. Indeed, he had been three times so convicted, and sentenced on each occasion to long periods of transportation.

The case was a very bad one, and I sentenced him to seven years' penal servitude, which was not more than an adequate sentence.

If I sentenced him to penal servitude and had power to do so for more than five years, I was bound to sentence him for seven.

If I had not such power, the sentence should not have exceeded five years.

On this I desire the opinion of the Court of Criminal Appeal,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

and according to that the sentence is to stand or be reduced to five years.

April 27.—No counsel appeared to argue on either side. The Court took time to consider its decision.

May 4.—KELLY, C.B. now delivered the judgment of the Court.—In this case we are of opinion that, inasmuch as the prior conviction was not mentioned in the indictment, the statute requiring a minimum sentence of seven years' penal servitude did not apply. Consequently, to the question whether the judge was bound to pass a sentence of seven years' penal servitude, we must answer that he was not so bound. The prisoner was entitled to have his identity tried by a jury, which could not be, as the prior conviction was not upon the record. The case of *Reg. v. Simmons* (11 Cox C. C. 248) is an authority to this effect. In thus giving effect to the sentence of five years' penal servitude instead of seven, we give effect to the learned judge's sentence, and we are not passing a sentence of our own. The judgment will, pursuant to the statute 11 & 12 Vict. c. 78, s. 2, be amended into a sentence of five years penal servitude.

Judgment accordingly.

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Indictment—
Previous
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COURT OF CRIMINAL APPEAL.

May 4 and 23, 1872.

(Before COCKBURN, C.J., BOVILL, C.J., KELLY, C.B., MARTIN, B., WILLES, J., BRAMWELL, B., BYLES, J., CHANNELL, B., BLACKBURN, J., MELLOR, J., PIGOTT, B., LUSH, J., HANNEN, J., CLEASBY, B., GROVE, J., and QUAIN, J.)

REG. v. ALLEN.(a)

Bigamy—Validity of second marriage—24 & 25 Vict. c. 100, s. 57.

Prisoner, while his second wife was alive, married a niece of his former deceased wife—the last marriage being within the prohibited degrees of affinity and void: (5 & 6 Will. 4, s. 54, s. 2.) Held, that he was guilty of bigamy.

CASE reserved for the opinion of this Court by Martin, B.

The prisoner was indicted for bigamy.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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On the 24th of February, 1853, he married one Sarah Cunningham.

She died in August, 1866, leaving a niece named Harriet Crouch.

On the 30th of November, 1867, he married one Ann Pearson Gutteridge, and on the 2nd of December, 1871, and in the lifetime of Ann Pearson Gutteridge, he married the above named Harriet Crouch.

It was objected by the learned counsel for the prisoner that the marriage with Harriet Crouch, his first wife's niece, was void, and that the crime of bigamy was not committed. It was stated that the Court of Criminal Appeal in Ireland had so decided, and in deference to that decision, at the request of the prisoner's counsel, I state this case.

The question is, whether the prisoner was guilty of bigamy.
SAMUEL MARTIN.

Bullen, for the prisoner.—The offence of bigamy was not committed in this case. The marriage with Harriet Crouch was absolutely null and void to all intents and purposes, being a marriage between persons within the prohibited degrees of affinity: (5 & 6 Will. 4, c. 54, s. 2.) No doubt the case of *R. v. Brawn* (1 Car. & K. 144) is a decision to the contrary, where Lord Denman said, "The validity or invalidity of the second marriage does not affect the question. It is the appearing to contract a second marriage and the going through the ceremony which constitutes the crime of bigamy, otherwise it could never exist in the ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other." Since that case, however, a case has occurred in Ireland, where seven to four of the judges held that the crime of bigamy was not committed where the second marriage was a void one: (*Reg. v. Fanning*, 10 Cox C. C. 411.) In that case the facts were, that F., a Protestant, was legally married, and while his wife was living he was married by a Roman Catholic clergyman to a Roman Catholic woman, representing himself at the time as a Roman Catholic, but it transpired that he was a professed Protestant within twelve months prior to the time of the second marriage. The second marriage was *ipso facto* void by the 19 Geo. 2, c. 13, s. 1, which enacts that "every marriage between a Papist and any person who hath been or hath professed himself or herself to be a Protestant at any time within twelve months before such celebrating marriage or between two Protestants, if celebrated by a Popish priest, shall be null and void." It was therefore held by the majority of the judges in *Reg. v. Fanning*, that the second marriage, not being a marriage in the eye of the law, the offence of bigamy was not committed. So in *Burt v. Burt* (29 L. J. 133, Prob. & Div.), it is stated in the judgment of the court, which consisted of Cresswell, J.O., Martin, B., and Willes,

J., that in order to establish bigamy you must prove such a marriage as but for the former marriage would have been in itself valid. Again, in *Reg. v. Millis* (10 Cl. & Fin. 689), Tindal, C.J., said, that the second marriage, to constitute bigamy, must mean a marriage of the same kind and obligation as the first.

Warry, for the prosecution.—Upon the true construction of the 24 & 25 Vict. c. 100, s. 57, “whosoever being married shall marry any other person during the life of the former husband or wife shall be guilty of felony,” the offence in this case was committed, though the second marriage was a void one. In *Reg. v. Fanning*, O’Hagan, J., in his judgment, said, “What meaning are we to ascribe to the words of the stat. 24 & 25 Vict. c. 100, s. 57? Are we at liberty to give to the same words in the two parts of the section different meanings? The first words, ‘being married,’ must mean a real legal marriage. Must the second words, ‘shall marry,’ be so likewise, and mean the same thing? It is impossible, for the second marriage was always null and void to all intents. I think the construction derived from the inherent invalidity of the second marriage is right. But I do not see why we should be bound in every case to attach to words the meaning which they first have, with the manifest result of giving impunity to a crime. The word ‘marry,’ in the second part of the section, must, in ordinary cases, be held to import not a real but a pretended marriage. Why should it not be held also in other cases to apply to a ceremony having all the outward marks of validity, but void from some other reason than the existence of the first marriage?” And Keogh, J., at p. 440, says, “There cannot be clearer or more coercive language than that used by Lord Denman in *Brawn’s* case. That decision was made in 1843, and has never since been questioned. I think it proceeds on a true reading of the whole of these statutes, and I think that the mistake of those whose opinion leans to the other side arises from the idea that the word ‘marry,’ in relation to the second marriage, used in the statutes against bigamy, involves that the second marriage must be identical with the first, whereas that is an impossibility. The second must always be null if the first is good; and then we must conclude that what was in the mind of the Legislature was that the party should be guilty of felony who went through the form or ceremony, so far as he was concerned, constituting a marriage, but which differed from the first marriage in this—that while it was a real marriage, the second was a sham.” [BLACKBURN, J.—Christian, J., at p. 437, says, “In *Brawn’s* case the ceremony was perfect; in this case there is no ceremony at all; and I can quite understand the distinction taken, though I do not say it is so, that in *Brawn’s* case a complete legal ceremony had been performed; that a state of marrying in that case within the definition of bigamy in the Act of Parliament had been completed, and the offence so constituted, even although, by reason of some disability personal to the party, a valid marriage did not

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follow. But whenever any of the legal essentials to the ceremony itself are wanting, then the state of marrying within the meaning of the Act of Parliament has not been perfected. If there be that distinction *Brawn's case* would be strictly right—and the very language of Lord Denman, who says that it is the ceremony which constitutes the crime of bigamy, would be strictly right, and so also the case put during the argument, by which I confess I was more embarrassed than by any other; the case suggested by Hughes, B., of a double bigamy. If it were shown that at the time of the second marriage both parties were already married, could the man defend himself from the prosecution of bigamy on the ground that the second marriage was void, by reason of the previous marriage of his wife? Can he defend himself by pleading that his wife was as guilty as himself, or, in other words, is neither of them to be held guilty because both are guilty? I confess I see no way out of it, unless there is the distinction I have been taking, on an apparent distinction taken by some members of the court, and which might be thought sufficient to sustain the conviction in the present case. I merely say that probably if the ceremony be complete as a ceremony, the act of marrying may be taken as complete, although it fails in its legitimate effect, by reason of some personal disability of the party. Upon that however I express no opinion.”] In *Reg. v. Brawn* (1 Car. & K. 144), where the woman, in the lifetime of her first husband, married a widower who had been her sister's husband, which would have been a void marriage under the 5 & 6 Will. 4, c. 54, s. 2, it was held that the validity of the second marriage did not affect the question of bigamy. So it seems that the assumption of a fictitious name upon the second marriage will not prevent the offence from being complete.

Bullen in reply.

Cur. adv. vult.

May 23.—COCKBURN, C.J., now delivered the judgment of the Court. This case came before us on a point reserved by Martin, B., at the last assizes for the county of Hants. The prisoner was indicted for having married one Harriet Crouch, he having a wife still living. The indictment was framed upon the statute, 24 & 25 Vict. c. 100, s. 57, which enacts that “whosoever, being married, shall marry any other person during the life of the former husband or wife, shall be guilty of felony.” The facts of the case were clear,—the prisoner had first married one Sarah Cunningham; and she having died, he had married his present wife, Ann Parson Gutteridge. The second wife being still living, he, on the 2nd of December, 1871, married one Harriet Crouch. So far the case would appear to be clearly one of bigamy within the statute; but it appearing that Harriet Crouch was a niece of the prisoner's first wife, it was objected on his behalf that since the passing of 5 & 6 Will. 4, c. 54, s. 2, such a marriage was in itself void, and that to constitute an offence

within the 24 & 25 Vict. c. 100, s. 57, the second marriage must be one which, independently of its bigamous character, would be valid, and consequently that the indictment could not be sustained. For the proposition that to support an indictment for bigamy the second marriage must be one which would have been otherwise valid, the case of *Reg. v. Fanning* (10 Cox C. C. 411) decided in the Court of Criminal Appeal in Ireland, was cited, and in deference to the authority of the majority of the judges in that Court, Baron Martin has stated this case for our decision. It is clear but for the statutory inability of the parties to marry one another if free, the marriage of the prisoner with Harriet Crouch, would have been within the 57th section of the Act. The question is whether that circumstance alters the effect of the prisoner's conduct in going through the ceremony of marriage with Harriet Crouch, while his former wife was still living. The same question arose in the case of *Reg. v. Brawn* (1 C. & K. 144), which was tried before Lord Denman on the earlier statute of 9 Geo. 4, c. 31, s. 22, the language of which was precisely the same as that of the present. In that case the prisoner, a married woman, had, during her husband's lifetime, married a man who had been the husband of her deceased sister. The same point as is now raised being taken on behalf of the prisoner, Lord Denman overruled the objection. "I am of opinion," said his Lordship, "that the validity of the second marriage does not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, which constitutes the crime of bigamy, or otherwise it could never exist in the ordinary cases, as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners (the male prisoner had been included in the indictment as an accessory), was or was not in itself prohibited, and therefore null and void, does not signify, for the woman having a husband then alive has committed the crime of bigamy by doing all that in her lay by entering into a marriage with another man." In the earlier and analogous case of *Reg. v. Penson* (5 Car. & P. 412), a similar objection had been taken on the ground that the second marriage was invalid by reason that the woman whom the prisoner was charged with having married while his first wife was alive, had, for the purpose of concealing her identity, been described as Eliza Thick, her true name being Eliza Brown. But Gurney, B., who tried the case, overruled the objection, being of opinion "that parties could not be allowed to evade the punishment for such an offence by concertedly contracting an invalid marriage." We should have acted without hesitation on these authorities, had it not been for the case already referred to, of *Reg. v. Fanning*, decided in the Court of Criminal Appeal in Ireland, a case which, if not on all fours with the present, is still closely analogous to it, and which, from the high authority of the court by which it was decided, was entitled

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to our most attentive consideration. We therefor took time to consider our judgment. The facts in *Reg. v. Fanning* were shortly these. The prisoner being a Protestant, and having within twelve months been a professing Protestant, was married, having a wife then living, to another woman who was a Roman Catholic, the marriage being solemnized by a Roman Catholic priest. Independently of the second marriage being bad as bigamous, it would have been void under the unrepealed statute of the 19 Geo. 2, c. 13, which prohibits the solemnization of marriage by a Roman Catholic priest where either of the parties is a Protestant, and declares such a marriage so solemnized null and void to all intents and purposes. On an indictment against the prisoner for bigamy, the invalidity of the second marriage was insisted on as fatal to the prosecution. The point having been reserved, seven judges against four in the Court of Criminal Appeal held the objection to be fatal, and quashed the conviction. After giving our best consideration to the reasoning of the learned judges who constituted the majority of that court, we find ourselves unable to concur with them, being unanimously of opinion that the view taken by the four dissentient judges was the right one. The reasoning of the majority of the court in *Reg. v. Fanning* is founded mainly on the verbal criticism of the language of the 24 & 25 Vict. c. 100, s. 57; and the words being that, if any person "being married" shall marry any other person, it was insisted that whatever sense is to be given to the term "being married" in the first part, the same must be given to the term "marry" in the subsequent part of the sentence; and that consequently, it being admitted that the term "being married" implies a perfect and binding marriage, the second marriage must also be one which, but for the prohibition of the statute, would be, whether as regards the capacity to contract marriage, or the manner in which the marriage is solemnized, binding on the parties. Two authorities were relied on in support of this reading of the statute: First, the language of Tindal, C.J., in delivering the opinion of the judges in the House of Lords, in the well-known case of *Rex v. Millis* (10 Cl. & Fin. 669), and the decision of the Judge Ordinary of the Divorce Court in the case of *Burt v. Burt* (2 Sw. & Tw. 88). In the first of these cases, Tindal, C.J., undoubtedly says that "the words in the first clause, and the words 'marry any other person' in the second, must of necessity point at and denote marriage of the same kind and obligation." But it must be borne in mind that the question before the House of Lords was, whether the first marriage—not the second—was valid. The validity of the second marriage was not in question at all. In order to show that what had passed between the parties on the first marriage had not amounted to a valid marriage, the Chief Justice of the Common Pleas urges that a similar proceeding between the parties would have amounted to no more than a contract *per verba de præsenti*, and would not, therefore, have sufficed to

constitute bigamy, had it happened in the second instance instead of in the first. The case put by the Chief Justice was not the point to be decided; it was only used for the purpose of argument and illustration. The question how far the incapacity of the parties to the second marriage to contract a binding marriage, independently of the bigamy, would take the case out of the statute, was not present to his mind, or involved in the decision of the case before the House. And the Chief Justice expressly states that though the conclusion he had arrived at was concurred in by the rest of the judges, the reasoning was entirely his own. The language of the learned Chief Justice must, therefore, be taken as extrajudicial, and cannot bind us in expounding the statute now under consideration. The case of *Burt v. Burt* in like manner falls altogether short of the question we have now to decide. It was a suit for divorce instituted by a married woman against her husband on the ground of bigamy, adultery, and desertion. To establish the bigamy, evidence was given that the husband had married a woman in Australia according to the form of the Kirk of Scotland, but there was no proof that the form in question was recognised as legal by the local law. Upon this latter ground the Judge Ordinary held that a second marriage was not proved so as to make good the allegation of bigamy. All, therefore, that this case shows is that a second marriage, by a form not recognised by law, will not amount to bigamy under the Divorce Act. Admitting, as we are disposed to do, that the construction of the two statutes should be the same, the decision in *Burt v. Burt* will not, as will presently appear, be found to conflict with our judgment in the present case: the second marriage in the present instance having been celebrated according to a form fully recognised by the law. We may, therefore, proceed to consider what is the proper construction of the statutory enactment in question, unfettered by these authorities. Before doing so, however, it should be observed that there is this difference between the case of *Reg. v. Fanning* and the present, that the form of marriage there resorted to was one which, independently of the bigamous character of the marriage, was, by reason of the statutory prohibition, inapplicable to the special circumstances of the parties, and ineffectual to create a valid marriage. Whereas, in the case before us, independently of the incapacity, the form would have been good and binding in law. This distinction is expressly adverted to by Christian, J., in his judgment, as distinguishing the case before the Irish judges from that of *Rex v. Brawn*, and it may be doubted whether, but for this distinction, that learned judge would not have come to a different conclusion. The other judges constituting the majority do not, however, rest their judgment on this distinction, but plainly go the length of overruling the decision of Lord Denman in *Reg. v. Brawn*. Their judgments proceed on the broad intelligible ground that to come within the statutes against bigamy the second marriage must be such as that but for

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its bigamous character it would have been in all respects, both as to the capacity of the parties and the ceremonial adopted, as binding as the first. Differing altogether from this view, and being prepared to hold that so long as a form of marriage has been used which the law recognises as binding, whether applicable to the particular parties or not, and further than this it is not necessary to go, the offence of bigamy is committed, we have only adverted to the distinction referred to in order to point out that our decision in no degree turns upon it, but rests on the broader ground taken by the dissentient judges in the Irish court. When it is said, in construing the statute in question, the same effect must be given to the term "marry" in both parts of the sentence, and that, consequently, as the first marriage must necessarily be a perfect and binding one, the second must be of equal efficacy, in order to constitute bigamy, it is at once self-evident that the proposition, as there stated, cannot possibly hold good, for if the first marriage be good, the second, entered into while the first is subsisting, must of necessity be bad. It becomes necessary, therefore, to engraft a qualification on the proposition just stated, and to read the words "shall marry," in the latter part of the sentence, as meaning shall marry under such circumstances as that the second marriage would be good but for the existence of the first. But it is plain that those who so read the statute are introducing into it words which are not to be found in it, and are obviously departing from the sense in which the term "being married" must be construed in the earlier part of the sentence. But when once it becomes necessary to seek the meaning of a term occurring in a statute, the true rule of construction appears to us to be not to limit the latitude of departure so as to adhere to the nearest possible approximation to the ordinary meaning of the term, or to the sense in which it may have been used before, but to look to the purpose of the enactment, the mischief to be prevented, and the remedy which the Legislature intended to apply. Now we cannot agree with Fitzgerald, B., in his judgment in *Reg. v. Fanning*, that the purpose of the statutes against bigamy was simply to make polygamous marriages penal, and that consequently it was only intended to constitute the offence of bigamy where the second marriage would, but for the existence of the first, be a valid one. Neither can we agree with those judges who, in *Reg. v. Fanning*, found their judgments on the assumption that, in applying the statute against bigamy, the second marriage must be one which, but for the first, would be binding. Polygamy, in the sense of having two wives or two husbands at one and the same time for the purpose of cohabitation is a thing altogether foreign to our ideas, and which may be said to be practically unknown, while bigamy in the modern acceptation of the term, namely, that of a second marriage consequent on an abandonment of the first while the latter still subsists, is unfortunately of too frequent occurrence. It takes place, as we all know, more frequently where one of the married parties

has deserted the other, sometimes where both have voluntarily separated. It is always resorted to by one of the parties in fraud of the law, sometimes by both, in order to give the colour and pretence of marriage where the reality does not exist. Too often it is resorted to for the purpose of villanous fraud. The ground on which such a marriage is very properly made penal, is that it involves an outrage on public decency and morals, and creates a public scandal by the prostitution of a solemn ceremony, which the law allows only to be applied to a legitimate union, to a marriage at best but colourable and fictitious, and which may be made, and too often is made, the means of the most cruel and wicked deception. It is obvious that the outrage and the scandal involved in such a proceeding will not be the less, because the parties to the second marriage may be under some special incapacity to contract marriage. The deception will not be the less atrocious, because the one party may have induced the other to go through a form of marriage known to be generally binding, but inapplicable to their particular case. Is the scandal or the villany the less because the man having represented to the woman who is his dupe, and to the priest, that he is a Roman Catholic, turns out afterwards to be a Protestant? Such instances as these we have referred to, thus involving public scandal or deception, being plainly within the mischief which we may reasonably assume it must have been the purpose of the Legislature to prevent, we are of opinion that we ought not to frustrate the operation of a very salutary statute by putting so narrow a construction on it as would exclude such a case as the present, if the words are legitimately capable of such a construction as would embrace it. Now, the words "shall marry another person," may well be taken to mean shall "go through the form and ceremony of marriage with another person." The words are fully capable of being so construed without being forced or strained, and as a narrower construction would have the effect of leaving a portion of the mischief untouched, which it must have been the intention of the Legislature to provide against, and thereby, as is fully admitted by those who contend for it, of bringing a grave reproach on the law, we think we are warranted in inferring that the words were used in the sense we have referred to, and that we shall best give effect to the legislative intention by holding such a case as the present to be within their meaning. To assume that the words must have such a construction as would exclude it because the second marriage must be one which but for the bigamy would have been as binding as the first, appears to us to be begging the entire question, and to be running directly counter to the wholesome canon of construction which prescribes that, where the language will admit of it, a statutory enactment shall be so construed as to make the remedy coextensive with the mischief it is intended to prevent. In thus holding, it is not at all necessary to say that forms of marriage unknown to the law, as was the case in *Burt v. Burt*, would suffice to bring a case

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within the operation of the statute. We must not be understood to mean that every fantastic form of marriage to which parties might think proper to resort, or that a marriage ceremony performed by an unauthorised person, or in an unauthorised place, would be a marrying within sect. 57 of 24 & 25 Vict. c. 101. It will be time enough to deal with a case of this description when it arises. It is sufficient for the present purpose to hold, as we do, that where a person already bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the statute by reason of any special circumstances which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case. After giving the case of *Reg. v. Fanning* our best consideration, we are unanimous in holding that the conviction in the case before us was right, and that the verdict must stand good.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

June 1, 1872.

(Before BOVILL, C. J., BRAMWELL, B., BYLES, J., BLACKBURN, J.,
and MELLOR, J.)

REG. v. THOMPSON AND OTHERS. (a)

*Evidence—Husband and wife—Admissibility of wife as witness for
a joint prisoner.*

*The wife of a prisoner jointly indicted and given in charge to the
jury with other prisoners, cannot be called as a witness by one of
the other prisoners whilst the husband is so in charge with them.*

CASE reserved for the opinion of this Court, at the Easter
Quarter sessions for the county of Essex.

This was a joint indictment against Thompson and Danzey for stealing 56lb. of onions, the property of their master, and against Hide for receiving the same, knowing them to be stolen.

The charge was that the first two, being sent with two carts of

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

vegetables to Covent Garden, stopped on the road at Hyde's house, and there disposed to him of this bag of onions stolen by the two conjointly from one of the carts.

The prisoners did not ask to be tried separately, but the first two retained one counsel, and Hide retained another.

The case depended mainly on what had been done and said at the door of Hide's house, and in his kitchen, by Thomson, Danzey, Hide, and his wife Elizabeth, and a maid servant Eliza, sister of the prisoner Thompson.

After the speech of the counsel for Thompson and Danzey, he tendered as a witness for his client, Elizabeth, the wife of the prisoner Hide.

This was objected to by the counsel for the prosecution, on the ground that her evidence must directly affect the case against her husband, inasmuch as the acquittal of the two would necessarily entail the acquittal of Hide, and moreover that anything tending to strengthen or weaken the evidence against them must have a similar effect on the evidence as regarded Hide.

The following cases were referred to :—*Rex v. Smith* (1 Moo. C. C. 281); *Reg. v. Moore* (1 Cox C. C. 59); *Reg. v. Bartlett* (1 Cox C. C. 105); *Reg. v. Deeley* (11 Cox C. C. 607); *Reg. v. Payne* (12 Cox C. C. 118).

Under these circumstances, and considering the general policy of the law, as rejecting the evidence of a wife for or against her husband in criminal cases, the Court refused to admit the evidence of the wife, subject to a case to be submitted to the Court for Crown Cases Reserved.

Thomson and Danzey were convicted and Hide was acquitted, and the Court passed on each of the two former a sentence of four months' imprisonment, and (no application being made to admit them to bail) execution was respited, and they were committed to prison to await the decision of the Court.

(Signed) T. C. CHISENHALE MARSH, Chairman.

No counsel appeared to argue on either side.

The Judges retired to consider their decision, and upon their return into court,

BOVILL, C. J., said:—We have considered the point reserved in this case, and are all of opinion that the wife of one of the prisoners stands in the same position, as regards the admissibility of her evidence at the trial, as her husband. The three prisoners were jointly charged upon the same indictment at the trial, and were all in the charge of the jury upon it, when the wife was tendered as a witness. The case is therefore not distinguishable in principle from *Reg. v. Payne*, and the conviction will be affirmed.

• Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

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(Before BOVILL, C.J., BRAMWELL, B., BYLES, J., BLACKBURN, J.,
and MELLOR, J.)

REG. v. MARTIN AND WEBB.(a)

*Misdemeanour—Jurisdiction to allow jury to view the locus in quo
—Witnesses accompanying jury—Jury asking questions of wit-
nesses during the view—Mistrial—Venire de novo.*

*Upon the trial of an indictment for indecent exposure in an urinal,
a Court of Quarter Sessions may allow the jury to have a view
of the locus in quo after the summing up of the judge.*

*But it is indiscreet to allow the witnesses to accompany the jury
in the absence of the prisoner or his advocate, or the presiding
judge.*

*Quære, whether if the facts have been examined into by the Court,
and are properly stated on record, the Court can order a venire
de novo where the witnesses accompany the jury, and are
asked by them to point out the precise spot where they stood and
saw what they had stated they saw.*

*But if the case sent up to the Court merely states that the Court
below "has been informed" that the circumstances specially set
forth took place, this Court will not act upon such statement.*

CASE for the determination of the Court for consideration
of Crown cases reserved by Mr. Serjeant Cox, the Deputy
Assistant Judge at the Middlesex Sessions.

The prisoners were indicted at the Quarter Sessions of the
county of Middlesex, held on the 6th of May, 1872, first for
indecent exposure in a public place, and second for inciting each
other to sodomy.

The case for the prosecution was proved by two policemen,
John Tunbridge, and Thomas Hunt. At six o'clock in the evening
of the 23rd of April, Tunbridge was on duty in St. James'-
park. He saw the prisoner Webb (who was well known to him
as a frequenter of urinals) lurking about one of the urinals in
the park, and going in and out of it repeatedly. His suspicions
being roused he hid himself and watched. Soon afterwards he
saw the prisoner Martin go in, upon which he crept up behind

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

the urinal and looking through the bars in the back wall he saw the prisoners in the act of exposing and handling the private parts of each other. He beckoned to Hunt, who came to the same spot, and witnessed the same proceeding on the part of the prisoners.

The defence was that from the position in which the witnesses stood, and that in which the prisoners were described as standing, it was impossible for the witnesses looking through the bars of the urinal to have seen so far down the persons of the prisoners as to have beheld the filthy act and exposure which they had described.

The prisoner Martin was defended by counsel.

The prisoner Webb was undefended.

After I had summed up the case, and while the jury were deliberating, they put some further questions to the witnesses as to their respective positions, and then the jury stated that it was very difficult to come to a decision without viewing the urinal and ascertaining by personal inspection if the witness could have seen what they had asserted, and they asked permission to view the *locus in quo*. Martin's counsel had then left the court. No objection to compliance with this request of the jury was made by either of the prisoners, or on their behalf.

In the absence of Martin's counsel I requested that his solicitor would accompany the jury on the view, and he also being absent the view was attended by the solicitor's clerk. The jury inspected the urinal, and there, *as I am informed*, asked the witnesses to point out the precise spot on which they had stood, and the place and the position in which the prisoners were standing, and then the jury placed themselves in the same position and looked through the bars.

On the return of the jury to the Court the counsel for the prisoner Martin had left the Court, but his solicitor or the clerk who had attended the view or both, were present. No application was made by either of the prisoners, or on behalf of either of them to be allowed to make any further comments to the jury on the proceedings at the view. I asked the jury if they required any further observations or information from me; on their answering in the negative, I directed them to retire and consider their verdict. After a short consultation they found both the prisoners guilty, and they were sentenced severally to nine months imprisonment with hard labour.

The counsel for the prisoner Martin has applied for a case for the opinion of this honourable Court on the ground that there had been a mistrial, first by reason of a view having been permitted to the jury after the summing up by the judge; and, second, by reason of the jury having at such view put some questions to the witnesses which were not heard by the judge, or by the prisoners, and upon which the undefended prisoner and the counsel for the defended prisoner had not been expressly called upon to comment to the jury.

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The question for the opinion of this honourable Court is whether, under the circumstances above stated, there has been made a mistrial. If it be the opinion of the Court that there has been a mistrial then that a *venire de novo* should issue, or such other judgment be given as the Court may determine.

(Signed)

EDWD. WM. COX,

Deputy Assistant Judge of Middlesex.

No counsel appeared for the prisoner.

Harris for the prosecution. First, as to the power of the Court to authorise the jury to view in a case of misdemeanour. There is no express authority against it, and it has often been done. [BLACKBURN, J.—On the trial of the Fenians at Manchester for shooting the policeman, I sent the jury out to view the police van in order that they might the better estimate the evidence that bore on it. The men were convicted and hanged. No one made any objection. We had no more power, though sitting under a Special Commission, than any other judge presiding under a criminal trial. MELLOR, J.—In that case no witness was allowed to accompany them. Here the policemen, who were witnesses, accompanied the jury and pointed out the place.] In *Reg. v. Hutchley* (1 Sess. Cas. 180), a *certiorari* to remove an indictment for stopping a watercourse into the Court of Queen's Bench was obtained in order that a view might be had, and the reason assigned was that without the consent of the prosecutors a view could not be had on any indictment found at the Assizes. [BOVILL, C.J.—At the last Surrey Spring Assizes on the trial of an indictment for a nuisance, the judge and jury went from Kingston to Bermondsey to have a view of the premises after the trial had been on for three days. That, no doubt, was a case where the indictment was removed from sessions to the Queen's Bench by *certiorari*.] There is no statute which deprives the Court of any power it may have to direct a view. Secondly, as to the jury receiving evidence during the view. All that was done was that the jury asked the constables to point out the precise spot where they stood. That is not equivalent to putting questions on the trial. [MELLOR, J.—The two constables were the witnesses. The whole value of their testimony may have depended on their giving correct answers as to the place where they stood. BLACKBURN, J.—It was indiscreet to allow the witnesses to accompany the jury, but I am not aware that what was done renders the verdict void in law. BRAMWELL, B.—If the jury by themselves had gone to view the place during luncheon time there would have been no harm in it, but the difficulty arises as to the witnesses going with them and pointing out the spot. What authority is there for our ordering a *venire de novo*?] In *Reg. v. Yeadon* (Leigh & Cave, 81; 9 Cox C. C. 91) this Court held that there had been a mistrial, and awarded a *venire de novo*. The following authorities were also cited: 2 Tidd's Prac. 922; *Witham v. Lewis* (1 Wils. 48); *Rex v. Fowler* (4 B. & Ald. 273).

The Judges retired to consider the case, and on returning into court,

BOVILL, C.J., said: The first objection to the conviction was that the jury were permitted to view the urinal after the summing up of the learned judge. We are unanimously of opinion that there was no irregularity and no impropriety in the learned judge allowing the jury to have that view. It must always be discretionary on the part of the judge to allow a view, and he should grant it, with proper caution to the jury not to receive any communications from the witnesses or otherwise whilst having the view. As to the jury, while they were having the view, asking the witnesses to point out the precise spot on which they had stood, and the place and the position in which the prisoners were standing, there appears to have been no examination by the Court below into these facts. It is, therefore, impossible to reverse the conviction on the statement in the case which may be mere hearsay information or mere report. If this had been examined into by the Court and stated as fact on the case a very serious question would have arisen as to whether a *venire de novo* could have been granted, or whether it would have been ground only for an application to the Home Secretary: (*Reg. v. Murphy*, 6 Moore P. C. C., N. S. 177.) (a) The case of *Graves v. Short* (Cro. Eliz. 616) does not appear to have been cited in *Reg. v. Murphy*. Other serious questions would arise as to whether this was a matter open on the record or within the jurisdiction of this Court. On this point *Reg. v. Mellor* (27 L. J. 121, M. C.; 7 Cox C. C. 454) has some bearing. As the case now stands we have no alternative but to confirm the conviction, but this will not prevent the prisoner from suing out a writ of error. If the case had come before the Court on a writ of error in its present shape, the Court must have acted as we have done. We cannot send the case down to be restated, as appears from the observations of Popham, C.J., in *Groves v. Short*. (b)

Conviction affirmed.

(a) *Reg. v. Murphy*. The marginal note is this:—A prisoner having been tried and convicted of a capital felony by a Court of Oyer and Terminer in New South Wales, and sentence of death passed and the judgment entered upon the record, an application was made to the Supreme Court sitting *in banco* for a *venire de novo* on an affidavit which stated that one of the jury had informed the deponent that pending the trial and before the verdict, the jury having adjourned to an hotel had access to newspapers which contained reports of the trial as it proceeded, with comments thereon. The Supreme Court made the rule absolute, considering that there had been a mistrial, and ordered an entry to be made on the record of the circumstances deposed to: that the judgment on the verdict should be vacated, and a fresh trial had. Held (on appeal to the Privy Council) acting on *Reg. v. Bertrand* (4 Moore P. C. Cas. N. S. 460), (1), that the discretionary power of the Supreme Court to grant new trials does not extend to cases of felony: and that a *venire de novo* cannot be awarded after verdict upon a charge of felony tried upon a good indictment by a competent tribunal; (2), that if a *venire de novo* could be awarded upon an application by way of error on appeal, the proceeding in the Supreme Court was defective in form, and not warranted by the suggestion on the record; (8), that the order for vacating the judgment, and for a *venire de novo*, must be reversed.

(b) *Graves v. Short* was an issue on a writ of formedon, and the jury retired to consider their verdict. One of the jurors, while they were in their room, showed to his fellow jurymen an escrow in writing *pro petentibus quod non fuit dat* in evidence, *per quod*

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UNITED STATES COURT.

PENNSYLVANIA COURT OF COMMON PLEAS.(a)

THE COMMONWEALTH v. YERKES.

*Larceny of a cheque—Obtaining a cheque by false pretences—
Evidence.*

A cheque is the subject of larceny if obtained animo furandi. What will constitute larceny of a cheque?

Distinction between larceny and obtaining by false pretences.

INDICTMENT: First count, for larceny of a cheque. Second count, for obtaining the same by false pretences.

The defendant had been authorised generally to purchase City Loan for the sinking fund of the city of Philadelphia. On a certain day he called at the office of the City Treasurer, and said he had bought 33,000 dols. of the loan, but he did not state it was for the sinking fund. A few minutes afterwards his clerk brought to the City Treasurer a note of the purchase, signed in the name of the prisoner's firm, upon which the treasurer gave the clerk a cheque, drawn on the Philadelphia bank, for the amount of the alleged purchase. This cheque the clerk took to the defendant's office, and handed it to one Hopkins, a fellow clerk, by whom the bill presented to the treasurer had been made out by direction of the defendant. This cheque was afterwards, by the defendant, deposited with a creditor in payment of a debt. In fact, he had never purchased the stock as he had represented, and soon afterwards became insolvent.

they found for the defendant. Upon this error assigned it was demurred in law. The Court resolved that it could not be any error. They also held that if this was cause to avoid a verdict if it had been so found by examination as they conceive it was not, yet in regard it was not examined nor made parcel of the record, it cannot be assigned for error. For Popham said "the trial hereof rests only in the examination, and it shall not be *per pais*: as nonage shall only be by inspection to avoid a fine, so this matter should to avoid the verdict. For if so, then every verdict upon such a surmise might be drawn in question, and peradventure after the parties be dead, and all the jurors be dead so as they cannot be examined, which would be a great inconvenience." And therefore they held that such a cause of stay of the judgment ought to be always if it be upon verdict at the *nisi prius* upon the *postea* returned; and if it be upon verdict *in banco* it ought to be made parcel of the record, otherwise the party shall not take advantage of staying the judgment or of assigning for error.

(a) I have introduced this case, although an American decision, because of its copious and exhaustive review of the nice distinctions between larceny and false pretences, so frequently occurring in our own criminal courts.—ED.

The COURT delivered an elaborate judgment, of which the most important portions are extracted: The defendant was the broker or agent of the city, for two purposes, viz: to sell City Loan, and to purchase, when required, loan for the sinking fund. There was no other relation existing between the city and the defendant. Webster defines a broker to be "an agent or negotiator, who is employed by merchants to make and conclude bargains for them, for a fee or rate per cent., or who transacts other business for his employers. Stockbrokers are such as are employed to sell shares in the stocks, whether of the public fund, of banks, or of other corporations." A higher authority, Judge Story, in his work on Agency, says: "The true definition of a broker seems to be, that he is an agent, employed to make bargains and contracts between other persons, in matters of trade, commerce or navigation, for a compensation commonly called brokerage. Properly speaking, a broker is a mere negotiator between the other parties, and he never acts in his own name, but in the names of those who employ him:" (Story on Agency, § 30) "There are various sorts of brokers now employed in commercial affairs, whose transactions form or may form a distinct and independent business. Thus, for example, there are exchange and money brokers, stock brokers, ship brokers, and insurance brokers, who are respectively employed in buying and selling bills of exchange, or promissory notes, or goods or stocks, or ships and cargoes, or in procuring insurance and settling losses, or in procuring freight or charter parties:" (*Id.*, § 32.) But in all these different classes, there is this one prominent feature, that they are mere agents, who transact business for a principal, for a fee or commission. If A. employ a broker, B., to purchase for his account 1000dols. of City Loan, or other stocks, B. thereupon becomes the agent of A. No other relation exists between them. If in pursuance of such employment B. purchases the stock from C., the legal effect of the transaction is, that C. is bound to deliver the stock to A., and the latter becomes the debtor of C. to the amount. And if A. deliver to B. the money to pay C. for the stock, and B., instead of doing so, converts it to his own use, he is a thief, both in law and morals. Nor does it make any difference whether B. discloses his principal to C. or not. The only effect of such non-disclosure would be, that C. would have no remedy against A. for the price of the stock. He would be compelled to look to the broker only. But, in the case just put, the broker still remains the agent of A. I am aware that a rule exists at the board of brokers of holding each broker purchasing stock personally responsible for the amount of his purchase, whether he disclose the name of his principal or not. With this the person who employs a broker has nothing to do. It is not in the power of the latter, nor of any board of brokers, to alter the law, nor to change a relation that is fiduciary in its character into the ordinary relation of debtor and creditor. It is objected that the application of such a rule as this would seriously embarrass

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the stock operations of brokers. With that we have nothing to do. We do not make the law. We merely declare and enforce it. But it is difficult to see how a rule which rests upon the solid foundation of common honesty can be productive of any serious results. It may, perhaps, interfere with financial kite-flying and wild speculations with the money of other people, but not with any legitimate operations. It is not too much to hold, that when a broker receives the money of another to invest in a certain security, he shall so invest it, or be responsible to the criminal law. It would be monstrous that the broker should lose it in speculation, and then turn round to his victim and say, "It is true, I have converted your money to my own use; I can neither repay you nor give you the stock; it is a mere matter of contract, I am your debtor, and you are my creditor for the amount." In this case the defendant was the agent of the city, to purchase for account of the latter stock for the sinking fund. He alleged that he had purchased from some one—no matter who—stock to the amount of 33,000dols. Supposing his statement to be true, the cheque was given to him. Given to him for what? To pay his own debts within an hour? Certainly not. It was given him to pay for the stock. The city never intended to part with the ownership in the cheque. It went out in the shape of money, for the money and the cheque are precisely the same thing for the purposes of this case. It was to come back in the shape of stock for the sinking fund. The city was neither to gain nor lose by the transaction. The 33,000dols. was still to remain the property of the city, in an altered shape it is true, but of equal value. The first count charges a larceny of the cheque, and this is the vital point of the case. We do not think this a case of false pretences, because there was not any intention on the part of the city officers to part with the property in the cheque, but with the possession merely, and no relation of debtor and creditor arose out of the transaction. It is to be observed that the count in question rests entirely upon statute. There was no such thing known to the common law as the larceny of a cheque, *qua* cheque. It is true, an indictment would lie for the larceny of a cheque as a *piece of paper*, of the value of a fractional part of a penny, but as a valuable piece of property, representing the dollars which it named, a cheque was not the subject of larceny. To remedy this evil, our Criminal Code (sect. 104), has expressly made it larceny to steal cheques and other securities. A similar statute exists in England, from which the section above referred to is in the main copied. So that at the present time, a cheque is as much property and the subject of larceny as a horse or a bale of muslin, and it is to be treated, not as a mere piece of paper, but as the representative of the money which it calls for and of a corresponding value. This case is to be considered precisely as if the defendant, instead of obtaining a cheque, had obtained the money from the City Treasury. It was urged upon the argument that the stealing of

a cheque in the hands of the drawer, before it had been put into circulation, was not larceny. It is difficult to see the soundness of this view. The value of a cheque consists in its being the representative of money, in being an order or paper, by the presentation of which at the proper place a certain sum of money can be obtained. The moment the maker has filled it up and signed it so as to enable the holder to draw the money, its value attaches, and it becomes property, to steal which is larceny. This point has been expressly ruled in England. In *Rex v. Metcalf* (1 Moody, 433), the prisoner was indicted for stealing a cheque. The cheque was drawn to bearer, and given by the drawer to the prisoner, for a specific purpose, to wit: to deliver to the Messrs. Caldecott. Instead of doing so, the prisoner applied it to his own use. He was found guilty of larceny of the cheque. Upon the trial the question was reserved, "whether the cheque in the hands of the drawer was of any value, and could be the subject of larceny?" The case was considered, and the judgment affirmed, eight of the nine eminent judges who heard the case concurring; only one of them, Littledale, expressing a doubt. We are of opinion that the moment this cheque was so far completed as to enable any one obtaining it to draw the money, it was the subject of larceny in the hands of the City Treasurer. We do not regard the fact that the cheque, after its payment by the bank, was returned to the City Treasurer as affecting this view of the case. It came back, it is true, so far as the piece of paper was concerned, but its value—that for which the law makes it the subject of larceny—was gone. Here again we must keep in mind the distinction between the cheque as a thing of value, as the equivalent of 33,000dols., and a worthless piece of paper. Every cheque stolen from the drawer must come back to him in case of its conversion by the thief, and we have seen, in *Rex v. Metcalf*, that a cheque is the subject of larceny in the hands of the drawer. It is immaterial what became of the cheque after it reached the possession of defendant, if it were obtained feloniously, as in the latter case the offence was complete the moment it was so obtained. But it was strongly urged by the learned counsel for the defendant, that the offence at most was but a false pretence, and that in any event it was not larceny, because there was no felonious intent. The distinction between larceny and false pretences is a very nice one in many instances. In some of the old English cases the difference is more artificial than real, and rests purely upon technical grounds. Much of this nicety is doubtless owing to the fact that at the time the cases were decided larceny was a capital felony in England, and the judges naturally leaned to a merciful interpretation of the law out of a tender regard for human life. But whatever may have been the cause, the law has come down to us with such distinctions and we propose to administer it as we find it. It is not our purpose to go a hair's breadth beyond the decided cases. The distinction between larceny and false pretences is well stated in Russell on Crimes, 4th edit., p. 200.

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After an exhaustive review of the cases, that learned authority says : " The correct distinction in cases of this kind seems to be that if by means of any trick or artifice the owner of property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny ; but if the owner part with not only the possession of the goods but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences." A review of the numerous cases cited upon the argument would be interesting, but would exceed the limits of this opinion, and the result would be to bring us to the principle above cited. By that principle this case must stand or fall, so far as this branch of it is concerned. The difficulty, if any, is not in the law ; that is uniform, and easily understood. But it is in applying the facts of each particular case to the law, and thus to ascertain what offence, if any, has been committed. It will be our endeavour to subject this case to this test. It must be conceded that if the city intended to part with its property in this cheque, at the time the defendant obtained it, and not with the possession only, then the offence would not amount to larceny. As if a man enter a store and by reason of a false statement induce the owner to sell him a bale of goods upon credit ; here the vendor of the goods parts with the property in the goods absolutely, and the relation of debtor and creditor is created. The merchant may have been overreached, but it is not larceny—at most a false pretence. Did the City intend, in the case now under consideration, to part with its property in the cheque, regarding said cheque, as we are bound to do, as the representative and equivalent of 33,000dols. ? Certainly not as in favour of the defendant. Was the offence larceny ? It is conceded that the possession of the cheque was parted with by Mr. Jones to the defendant. The latter did not snatch it up and run away with it. But it is alleged by the commonwealth, and the jury have so found, that the defendant resorted to an artifice, a fraud, by means of which Mr. Jones was deceived, and induced to part with the possession of the cheque. The rule of law is well settled, that if the possession of property is obtained by an artifice, accompanied with the felonious intent on the part of the person obtaining it to convert it to his own use and if he does so convert it, the offence is larceny. This principle is thus recognized in Wharton (sect. 1847) : " Larceny may be committed of goods obtained from the owner by delivery, if it be done *animo furandi*. When the owner unlawfully acquired possession with an intent to steal them, the owner still retaining the property in them, such person will be guilty of larceny in embezzling them." In illustration of this doctrine, the learned author cites, in the section referred to, the familiar case of hiring a horse on pretence of making a journey and immediately selling it. This is larceny, provided the jury find that the defendant acted *animo furandi* in making the contract. " Where a man, having the *animus furandi*,

obtains in pursuance thereof possession of the goods by some trick or artifice, this is considered such a taking, even although there be a delivery in fact, as to constitute larceny." *The State v. Gorman* (2 Nott & McCord, 90); *Starkie v. The Commonwealth* (7 Leigh, 752); *The State v. Thurston* (2 McMullen, 382, 395), and other cases cited in note to *Com. v. James* (Heard's L. C. C., vol. 2, p. 192). In *Reg. v. Johnson* (14 E. L. & E. 570) the prisoners were indicted for larceny. By trick and fraud they had induced the prosecutor to draw a cheque to one of the prisoners "or bearer" for £42. He accompanied one of them to the bank to see it cashed, upon the understanding that prisoner was to return with him to his shop and hand over to him forty-two sovereigns, which the other prisoner retained at the shop. At the bank he handed the cheque to the prisoner directing him to get four ten pound notes and two sovereigns in change. The prisoner obtained the change and eloped, and his confederate had also eloped with the forty-two sovereigns when the prosecutor returned to his shop. The chairman of the Quarter Sessions put the following questions to the jury; and the jury found the following answers: 1st. Did the prisoners throughout intend to get the property of the prosecutor into their possession by fraud, and apply it to their own use? Answer—Yes. 2nd. Did the prosecutor intend to part with his *property* in the cheque, and change, until Johnson returned with them, and the prosecutor received the forty-two sovereigns? Answer—No. Lord Campbell, C.J., delivered the opinion of the court. He says: "The jury have found that the prisoners throughout intended to get the property of the prosecutor into their possession by fraud, and apply it to their own use." The conviction of larceny was sustained. In *Reg. v. Heath* (2 Moody C. C. R. 33), the prisoner was entrusted with a cheque drawn to bearer, with instructions to deliver the cheque, but appropriated it to his own use. Held to be larceny of the cheque. In *Reg. v. Perry* (1 Cox C. C. 222), the defendant was convicted of larceny of a cheque, given him to pay to the overseers of the poor, and for which he was to get a receipt, but he appropriated the money to his own use. Some doubt arose whether the conviction was good, the cheque not being stamped according to law, but the judges held that the conviction on the second count, for "stealing a piece of paper of the value of one penny was good." *Reg. v. Brown* (1 Dears. C. C. 616) was an indictment for larceny. Prosecutor owed some money to Mr. Staines, and said to his servant in the hearing of the prisoner: "George, you must go to Mr. Staines and pay him this money," and thereupon prisoner said he was going that way, and offered to take it. Induced by the offer of the prisoner, the prosecutor gave him the money to carry to Mr. Staines, in discharge of the debt. Prisoner's statement was false, and he converted the money to his own use. The jury were told that the prisoner was guilty of larceny, if they were of opinion that he obtained the property by a trick, and meant at the time to appropriate it to

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himself (but that if he took it from the prosecutor *bonâ fide*, it was not larceny). The case was reserved, and the court held the conviction right. In *Reg. v. Aickles* (2 East, P. C. 675) the prosecutor and the defendant had agreed that the defendant should discount a bill, and for that purpose a bill was given him, when the defendant told the prosecutor that if he then sent a person to his lodgings, he would give him the amount, deducting commission and discount; a person was sent accordingly, but upon reaching the lodgings, the defendant left the messenger there, and went out under the pretence of getting the money, but never returned. Held to be larceny. In *Reg. v. Robins* (29 E. L. & E. Rep. 544), some wheat, not the property of the prosecutors, but which had been consigned to them, was placed in one of his storehouses in care of a servant, E., who was to deliver the wheat only to the orders of the prosecutors, or their managing clerk, C. The prisoner, who was in the employ of the prosecutors, obtained the key of the store-house from E., and was allowed to remove a quantity of the wheat, upon his representing to E. that he had been sent by C., and was to take the wheat to the Brighton Railway station. This representation was false, and he subsequently disposed of the wheat. Held to be larceny of the wheat. So obtaining money by the practice of ring dropping (as it is called), has been held to be larceny: (*Rex v. Patch*, 1 Leach, C. C. 238.) So where the prosecutor was induced by a preconcerted plan, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stockholder afterwards, upon pretence that one of his confederates had won the wager, handed the money over to him; and it was left to the jury to say whether, at the time the money was taken, there was not a plan that it should be kept, under the false colour of winning the bet, and the jury found that there was; this was held to be larceny: (*Rex v. Robson, Russel & Ryan*, C. C. 413.) In like manner, the obtaining of goods under cover of legal process may amount to larceny. As if a man, *animo furandi*, sue out a replevin, and by that means obtains the possession of another man's horse and rides away with it; or by a fraudulent ejectment get possession of another's house and carry away the goods out of it, he is guilty of larceny: (1 Hale, P. C. 507; 7 Hawkins, P. C. ch. 33. sect. 12.) These, and numerous other cases which might be cited, illustrate the principle, that the obtaining the possession of goods or property, *animo furandi*, by trick, fraud, or artifice, amounts to larceny. In this case it is claimed that there was no larceny, because there was no felonious intent. It was the especial province of the jury to dispose of this question, and they have settled it against the defendant. It was fairly submitted to them as a question of fact, with the instruction, substantially, that they must be satisfied from the evidence, beyond a reasonable doubt, that the defendant took the cheque feloniously, with intent to convert it to his own use, or that he obtained it by a trick or artifice, with a like felonious intent at the time he obtained it. Shall we say the jury

were wrong and reverse their finding? If there were no evidence of any felonious intent, or if the evidence greatly preponderated against such intent, we should feel bound to set aside this verdict. While we seek to administer the law impartially, we will not be astute in opening avenues of escape for criminals. We cannot say that there was not sufficient evidence of the felonious intent to sustain this verdict. For what purpose did the defendant get that cheque? He was upon the eve of failure. He had already hypothecated for his own debts the loan of the city placed in his hands for sale. He had unlawfully obtained 300,000dols. in cash as a loan, and it is reasonable to suppose that he could obtain nothing more from the City Treasury by any ordinary means. Then it is that he goes there, and with a falsehood upon his lips obtains 33,000dols. more. The jury have found the intent with which this was done. We are not prepared to say they were wrong. In an ordinary case, the facts would have been too clear for doubt, and we will not hesitate here, because of the magnitude of the offence or the standing of the offender. The justice which we administer to the humblest criminal will be accorded to this defendant. Nothing more, nothing less. The jury having found the *animus furandi*, and in the opinion of the court, upon sufficient evidence, our judgment is, that the offence committed by the defendant in this case was larceny. In what we have said we have answered most of the reasons assigned for a new trial by the learned counsel for the defendant. It remains to notice the remainder specifically. They refer either to the admission or exclusion of evidence, and to alleged errors in the charge of the court. The first, second and sixth reasons all relate to the exclusion of evidence concerning the loan (145,000dols.) placed to the credit of the defendant for the purpose of sale on the 1st of October. We think this evidence was properly excluded, for the reason that we are unable to see how it had any possible bearing upon the issue before the jury. It had nothing to do with the alleged purchase of stock for the sinking fund. If the whole amount of the former loan had been standing to the credit of the defendant on the 14th of October, it was no answer to the charge contained in the bill of indictment. It was not his loan. It belonged to the city, and he had no power over it except the power to sell it for account of the city. He could not sell or pledge it for his own debts without a breach of trust, little short of larceny in its moral guilt. Much less could he fill the order for the sinking fund out of it, for the city, as before observed, was the owner of it already. The fourth reason referred to previous transactions in regard to the sinking fund, and the evidence rejected was clearly incompetent, as it affected the particular transaction charged in the indictment. The fact that a defendant upon a former occasion had an opportunity of committing a larceny, and did not do so, is no answer to a specific charge of larceny at a later day. The fifth and seventh reasons refer to the exclusion of evidence as to the cause of the failure of the

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defendant. It was alleged that a demand had been made upon defendant on the 16th of October for a portion of the borrowed money due to the city, and that said demand was the cause of his failure. A portion of the evidence rejected was subsequently allowed to go to the jury, but it was wholly irrelevant. The inquiry was, whether the defendant was guilty of the larceny of a certain cheque; not what was the immediate cause of his failure? The question referred to in the eighth reason was asked by the Commonwealth upon cross-examination, and was strictly responsive to the examination in chief. In this, therefore, there was no error. The remaining reasons allege errors in the charge of the court. It is proper to say that the alleged errors were not called to the attention of the court at the time, nor was any objection made then to the matters now complained of. Nor was I asked to give any specific instructions to the jury. It is always competent for counsel to obtain the views of the court upon a point arising in the case by submitting such point with a request to charge upon it; or, if anything has been omitted material to the case, the omission can be supplied by calling the attention of the court to the fact. When a jury has been allowed to leave the box without any intimation to the court that counsel are dissatisfied with the charge, an after objection does not come with the same weight it would have been entitled to if made earlier. Nevertheless, we have considered these objections, and will dispose of them as though they had been made at the time of the trial. The ninth reason alleges error in the following passage of the charge: "If this be true, gentlemen, if the evidence in this case satisfies you that this cheque was obtained under the false representation that the defendant had purchased city stock for the sinking fund, when, in point of fact, he had not so purchased it; that he converted the money to his own use, and that he intended so to do when he obtained the cheque; then I instruct you, as a matter of law, that the defendant would be guilty of larceny, as laid in the first count of the bill of indictment, because, while the principle of law undoubtedly is, that there must be a felonious taking, still, where a person resorts to falsehood and fraud in order to obtain possession of property, it is the same as taking it feloniously." This passage must be taken in connection with the rest of the charge. The jury had previously been instructed as to the general nature of larceny, and were told that there must be a felonious taking, with intent to convert the property to the use of the person so taking it. But here the cheque was delivered to the defendant by the chief clerk of the City Treasurer, and it differs from ordinary larceny in this, that the possession was obtained by an artifice. It is, as we have seen, text law, that when the offender unlawfully acquires possession of property with intent to steal it, the owner still retaining his property in it, such person will be guilty of larceny. Here the cheque was not stolen in the ordinary acceptation of the term; the possession of it was acquired by a trick; and if at that time the defendant intended to convert it

to his own use feloniously, the offence would be larceny. We see nothing in this portion of the charge which we think could have misled the jury. The tenth reason alleges error in referring to the financial condition of the defendant, as bearing upon the question of motive. In addition to the passage quoted of the charge, I referred to the fact of the defendant being upon the eve of failure. If this be error, it makes it the stronger for the defendant. The evidence upon this branch of the case had been admitted without objection, and I left it to the jury as a fact they were entitled to consider in determining whether the defendant acted with felonious intent. Surely, when a man is charged with the larceny of a cheque for a large amount of money, it is competent to show that at the time he was sorely pressed for money, and therefore had the strongest motive to commit the larceny. Evidence of a like character has been repeatedly admitted in capital cases. Among them may be mentioned the cases of Winnemore and Twitchell, tried and convicted in this court; the case of Robinson, charged with the murder of Suydam (Wh. Cr. L., page 851); the case of Colt, charged with the murder of Adams; and the celebrated case of Dr. Webster, convicted of the murder of Dr. Parkman. In the latter case, indebtedness was shown to persons other than the deceased: (Bemis' Report, 151, 160.) We regard this point as too well settled to need further argument, or citation of authority. We do not see any error in that portion of the charge embraced in the eleventh and twelfth reasons. There was no evidence in the cause of any purchase by the defendant of the stock for the sinking fund. Nor was there any offer to prove such purchase. The question whether the offence was committed by the defendant or his book-keeper was properly left to the jury. The 13th, 14th, 15th, and 16th reasons refer entirely to portions of the charge upon the last three counts of the indictment, as to which counts, as we have already seen, the verdict must be set aside. This renders their further consideration in this place unnecessary. The instruction complained of in the seventeenth reason, to the best of my recollection, was given after the conclusion of the general charge, in reply to a question from counsel, and referred exclusively to the fact as to whether the conversion of the cheque to the use of defendant was done with or without his consent, which fact was left to the jury. In this we see no error. It has been urged that as there has been a mis-trial as to the last three counts, and the verdict thereon will have to be set aside, that there should be a new trial as to the first count, for the reason that the jury may have been influenced by the evidence given upon the said last three counts. In support of this view the learned counsel for the defendant have cited *State v. McUanless* (9 Iredell, N. Carolina Rep. 377); Wh. C. L., § 3088; 2 Ch. C. L., § 3090; *Com. v. McGowan* (2 Pars. 347); *Com. v. Simons*, (6 Philada. 168). This is not the case of a verdict upon defective counts. In such case the court can enter judgment upon the good count or counts, if any

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there be. But the counts here are all good in point of law, but as to three of them the verdict is not sustained by the evidence. The text cited in Wharton evidently has no reference to the case of separate instructions upon different counts, but to general instructions applicable to a single count, or to all the counts in the bill. If, in the charge upon the first count there had been error in one material point, it would have been fatal, although as stated in Wharton, "the jury may have properly found their verdict upon another point as to which there was no misdirection." The point decided in *State v. McCannless* (9 Iredell, 375) is this, that when there are two good counts in an indictment, and the court gives erroneous instructions to the jury as to one of the counts, and there is a general verdict against the defendants, and judgment thereon, it is presumed that the judgment is given upon both counts, and a *venire de novo* will be awarded. In that case the *venire de novo* was awarded mainly because the court had passed sentence upon the count as to which there had been a mis-trial. The other cases cited refer to the admission of evidence which might have influenced the jury in their verdict upon the counts upon which there was no mis-trial. It is submitted that this is the true test. It is conceded that if any evidence was received in support of the last three counts, which would not have been admissible under the first count, there ought to be a new trial. And this for the reason that it is impossible to tell how far such evidence may have influenced the jury. But upon a careful review of the whole case it is impossible to find a word of evidence that was not strictly admissible under the first count, and must have been admitted had there been but the one count. The defendant, therefore, could not have been injured. Where the reason of the rule fails, the rule fails with it. If the jury had returned a verdict of not guilty upon the three counts referred to, would it have interfered in any way with our entering judgment upon the verdict of guilty upon the first count? This can hardly be pretended, and yet what is practically the difference between such a case and the setting aside of the verdict on the said three counts by the court? This case, as well as that of *Com. v. Marcer*, has been twice argued upon this motion. The first time the President Judge, and my brother Peirce, sat with me at my request, to aid me with their wisdom and experience. Impressed with the gravity of these cases, not only to the community, but to the defendants; in view of the fact that important principles of law were involved, which should be settled calmly and deliberately, we ordered a re-argument before a full bench. We have given a careful and anxious consideration to the law, and the facts of the case, as well as to the able and exhaustive arguments of the learned counsel; and while we are not unanimous in our conclusions, the majority of the court are so well settled in their convictions, that we cannot hesitate as to our duty. The verdict as to the second, third, and fourth counts is set aside, and the rule for a new trial is refused.

Dissenting opinion by FINLETTER, J.:

I propose to examine the question of law involved in this case, without regard to the magnitude of the interests, or the standing of the defendant. I am influenced by neither. My views would be the same upon the law and facts if they applied to the meanest outcast in the community. What constitutes a particular offence can never be a matter of doubt. All crimes are as well defined as mathematical axioms, and follow logically from ascertained facts. Evidence may be vague, uncertain, and indefinite; or, being clear and satisfactory, may be inaptly applied to principles of law. From this arises all the difficulty in investigations of this character. It is proper, therefore, at the outset, to ascertain with precision the facts upon which the Commonwealth relies to sustain the conviction. Prior to the 14th day of October, 1871, the defendant had been authorised generally to purchase City Loan for the sinking fund. On that day he called at the office of the City Treasurer. He said he had bought 33,000dols. of the City Loan, "but he did not just state it was for the sinking fund." About five minutes after this, one of his employees came in with a bill which is as follows:—

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PHILADELPHIA, Oct. 14, 1871.

C. T. Yerkes, Jr., & Co., sold for account of Jos. F. Marcer, Esq., Treasurer:

27,200 city 6s, new, at 99 $\frac{1}{8}$ - - - -	\$27,166.00
5,800 " " 100 - - - -	5,800.00
Commission - - - - -	82.50
	<hr/>
	\$33,048.50

Received payment,

C. T. YERKES, JR., & Co.,

JOHN S. HOPKINS, Att'y.

Upon presentation of this bill, Mr. Jones gave the cheque to the person who had brought the bill. He says, "after the cheque was drawn I endorsed it. I then handed it to Mr. Yerkes's young man who brought the bill, and told him to be very careful and not lose it. The cheque was drawn on the Philadelphia Bank." * * * "Mr. Yerkes was in the office when the messenger came and when he left; he handled the cheque before the boy took it out of the office." The boy says, "I took a bill to Mr. Jones on the 14th of October, and got the cheque for 33,048.50dols. He gave me the cheque. Mr. Yerkes was not in either place; I say that positively. I handed the cheque to Mr. Hopkins." Mr. Hopkins, who was a clerk for defendant, says, "I believe I first suggested that bill. Mr. Yerkes did not indicate the form of the bill. I don't recollect what hour this was. I was at the desk at the time, and Mr. Yerkes was passing out of the office. This is my signature on the cheque. That cheque was put in the First

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National Bank. Mr. Yerkes directed me to make out the bill for 33,048.50dols. I sent for the cheque myself. When he was going out I asked him if I should send the bill down the street. I asked him that question to know whether it was for the purchase of city sixes during the month. * * * I drew all the cheques on Saturday. I don't recollect any cheque drawn by me on Saturday or Monday by the directions of Mr. Yerkes. * * * Mr. Yerkes bought in the month of October 43,800dols. worth of City Loan. I did not tell Mr. Yerkes I had deposited the cheque. I said nothing to him about it." On Monday the 16th Mr. Jones told defendant "he had made no return of that 33,000dols. He said his brother Joseph had the order, and perhaps he had not time to attend to it." The defendant did not furnish the loan; and on the 16th he became insolvent. The argument of the Commonwealth is, that the defendant obtained a qualified possession of the cheque by fraudulent representations that he had purchased for the sinking fund 33,000dols. of City Loan; and at that time he intended fraudulently to appropriate it. Under this view, it is apparent that the defendant could not be convicted of any offence unless it was proved that he had not bought the loan for the sinking fund. This, though negative, must be established before the defendant could be called upon to answer. It is nothing that it might be difficult—nay, even impossible. The defendant might have bought the loan for that particular purpose, and yet be without the means to prove it. From the testimony it appears that it was a matter of policy, approved by the treasurer, that purchases for the sinking fund should not be known or understood in the market, or in the public, in that light. The effort being always to conceal this fact, even if the defendant had purchased the full amount of the loan for the purpose of direct transfer to the sinking fund, he might be without the evidence thereof, if anything intervened to prevent him from making the transfer. The Commonwealth could only establish this essentially material part of her case by showing, that from the time he last had transferred City Loan to this fund, to the time of presenting the bill, he had not purchased any on his own account; or had not any subject to his control. There was no particular time when the loan was to be bought; nor was there any particular amount mentioned at any time to be purchased. Whenever the defendant had any of the loan for this purpose he announced the fact to the treasurer and was paid by a cheque upon the sinking fund. He was, therefore, at full liberty to sell his own stock in this way. Besides, it was in evidence that in the month of October he had purchased 43,800dols. of the loan. The presumption being always, if possible, in favour of innocence, why should it not be considered that he purchased or held this loan with the intention of transferring it to the sinking fund; or that he had that intention at the time he received the cheque? It is nothing to the purpose of this inquiry that subsequently he sold or hypothecated it to other

parties. It will not be questioned that if he had City Loan which he intended to place to this account at the time he received the cheque he could not be convicted on the first count of the indictment. The intention to transfer the loan at that time would negative any fraudulent intent. Furthermore, unless the defendant intended at the time he received the cheque fraudulently to appropriate it, he could not be convicted upon the first count, even though he was merely a bailee of the cheque. It is not enough to show that he did so appropriate it subsequently; for that is entirely consistent with an honest intent at the time he received it. It is true that in law it is presumed that every man intends the natural consequences of his wilful act; but that intent is only contemporaneous with the act. It cannot be legitimately inferred, from the mere fraudulent appropriation, that the intention existed at any given antecedent time, or at the very point of time at which the property was received. If this could be done, the distinctions which have arisen and which have made it necessary to create here and in England larceny by a bailee would never have occurred. It has been argued that both of these points have been settled as questions of fact by the verdict of the jury. The intent when not avowed can only be inferred from acts and declarations. It must be as distinctly established as any other requisite of the offence charged. It must be begotten of and be sustained by the testimony. If it be not, it does not legally exist, and cannot be created by the verdict of a jury. Indeed, as it necessarily must be incapable of disproof by the defendant, unless by acts and declarations which are the natural circumstances of his case, and which to be of any value to him must be free from all appearance of preparation, an intent should never be inferred unless it be the irresistible and logical sequence from unquestionable evidence. The verdict of a jury without evidence, or upon insufficient evidence, is not conclusive of any fact. When there is a conflict of testimony, or when there is any testimony in the case to warrant the finding of a jury, it may be otherwise. That is not and cannot be a "true verdict" which is not verified by the facts. Here the jury have found the intent of the defendant in both requisites of the first count; and yet as to neither is there evidence sufficient from which that intent could be properly inferred. It may very well be that such was the intent of the defendant, and that the jury so believed. But it was as little their duty to guess at his intent, as to record by their verdict a belief not warranted alone by the testimony. Surely, when the intent constitutes the crime which makes a citizen infamous, and deprives him of his liberty, we should look beyond the verdict of a jury for the evidence which supports that finding. In this connexion the language of Chief Justice Tilghman, in *Lewis v. The Commonwealth* (15 S. & R., p. 99), seems very pertinent: "Is it to be said, that the seller had an original intent to defraud the buyer of his money, and was therefore

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guilty of larceny? No, will be the immediate answer of the counsel of the Commonwealth, and there is no danger of any man's being improperly convicted of larceny, because the jury are to decide whether the intention was felonious. But juries have sometimes their passions and their prejudices. There are times when the public mind is strongly excited, and juries are hurried away by the common feeling. A man is thrown into a tremendous uncertainty who has nothing to trust to but the opinion which a jury may form of his secret intention; a matter of which, after all, they can have no positive or certain knowledge." Besides, the jury in this case, upon three counts, found the defendant guilty without the semblance or shadow of evidence. This displays such a rashness or want of judgment as should take from their verdict upon the first count that special virtue which has been claimed for it. How can we say that their conclusions upon the first count are unerring when they so palpably erred upon the other counts. However this may be, there does not appear to be sufficient evidence in the case to justify the jury in saying that such intent existed beyond a reasonable doubt. If these views be correct, it follows that the Commonwealth failed at the threshold of her case. The crime charged is larceny of a cheque under the statute, which is as follows: "If any person shall steal any draft or cheque, &c., such person shall be deemed guilty of larceny." The purpose of this Act was not to create a new species of crime, but to make that property which theretofore had not been property and not the subject of larceny. What the terms "steals" and "larceny" may mean must be determined by the known principles of law. Actual larceny is when the party takes the goods out of the possession of the owner or his bailee *invito domino* by force or by stealth *animo furandi*. It has been defined to be "the felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker." Its elements are therefore a trespass in taking against the owner, and a felonious intent in appropriating the property of another. Constructive larceny, which is the outgrowth of decisions, is where the taking is not *invito domino*, but with his consent. In actual larceny nothing but the possession passes to the thief; the property still remains in the owner. In constructive larceny, in like manner, nothing but possession passes to the taker from the owner. If the property in the thing passed, there could be no larceny, because the taking being with the consent of the owner is not unlawful; and the right of property being in him who takes, from the first moment of possession, thenceforth the *animus furandi*—the appropriation to his own use of the goods of another—can never arise. In constructive larceny, therefore, the great, perhaps the only question, is what did the owner intend to give the taker? The cases which establish what constructive larceny may be are too numerous for citation. To ascertain the principles which they affirm, we may classify them as follows: 1st, Where there is a bare charge or

custody given. 2nd, Where the delivery is for a specific purpose. 3rd, Where the thing given is intended to remain in the presence of the owner. 4th, Where the goods are delivered as a deposit, as a stake upon a bet. It is clear that in cases under these heads no right of property could pass. Property in a thing means absolute dominion over it, in the present and in the future. It includes actual possession with the right of possession, without adverse control and without accountability. The right of property means the right to exercise dominion. When it exists without possession, larceny cannot be committed against it, because larceny is the taking from the possession. In all cases included in the above classification and, indeed, in all cases of constructive larceny, the possession never passes from the owner, and therefore not only the right of property, but the possession also, remains in the owner; and this preserves to him property or dominion which may be the subject of larceny. Where the property in the thing is intended to be transferred to the identical person to or for whom the delivery is made, it does in no case amount to larceny, because however fraudulent the intent may be, yet there is no trespass in the taking, without which there can be no larceny: (2 East. 669.) The distinction in cases of this description seems to be that, if by means of any trick or artifice the owner of the property is induced to part with the possession only, still meaning to retain the right of property, the taking by such means will amount to larceny; but if the owner part with not only the possession of the goods but the right of property in them also, the offence of the party obtaining them will not be larceny, but the offence of obtaining goods by false pretences: (Russell on Crimes, 200.) If a man with intent to steal his neighbour's goods by fraud induces the neighbour to deliver them to him under any understanding that the property therein is to pass, he commits not this crime; but, if with like intent he thus fraudulently obtains leave to take only the possession, he becomes guilty of larceny, because his intent is to appropriate the property in the goods; while the consent fraudulently obtained covered no more than the custody: (1 Bishop, Crim. Law, § 432.) When, however, one for the purposes of fraud makes use of a false token, and thus persuades another to part with his property, he is indictable for the cheat, though the act is not larceny: (1 Bishop, Crim. Law.) This seems to be the doctrine of all the text writers. It is clearly and broadly established as the law of our State by the Supreme Court in *Lewis v. The Commonwealth* (15 S. & R. 98). It is therefore of vital importance to understand precisely how the defendant received and held the cheque. He had, before this transaction, purchased for the sinking fund. Upon the same kind of bill he had received the same kind of cheque. Jones says, "this form is the one we use in making out all sinking fund cheques. * * * Mr. Yerkes has been the agent for selling and buying the City Loans for some years. When money is wanted for the sinking

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fund, the course is to authorise the broker to purchase so much loan. Sometimes I would tell him that we would soon be in want of loan for the sinking fund. In some cases the loan for the sinking fund was not supplied for several days after the cheque was given. The form of the bills was, "Charles T. Yerkes sold to Mr. Marcer." Mr. Scarborough says, "the stock applied to the sinking fund was put to the order of Joseph F. Marcer by Mr. Yerkes." It would appear from this, that in the purchase of City Loan for the sinking fund, the City Treasurer dealt with the defendant directly, and not through him with the persons from whom the loan was bought. The bill was made out in the name of the defendant, not only for the loan, but also for the commissions. The cheque was for the whole amount. It was, moreover, paid under the impression that the loan had been purchased. It was, therefore, to reimburse him for the money expended in the purchase. It is not probable, and it is hardly possible, that Jones could have given him the cheque with any idea that it should be passed to the person or persons from whom the loan was bought. Besides, at the time the cheque was given Jones knew that all cheques of like character, which had been given to Yerkes for a like purpose, had been drawn and collected by him. If, after this, any doubt could remain as to Jones's intention when he gave the cheque, it should be removed by his testimony. He says, "the cheque for 33,048.50dols. was drawn in order that Mr. Yerkes might draw the money from the treasury for the payment of loans. It was the intention in giving it that he should draw the money." Nor should it be forgotten that at no time did Jones place any restriction upon the use of the cheque, or in any way direct the application of the proceeds. When a cheque payable to bearer is thus given, the natural and legal presumption is, that it is for the receiver's use and benefit, and carries with it the right of conversion. What special right or reservation in the drawer, or disability in the receiver, passed with this cheque? In what particular was the defendant's dominion over it restricted or controlled? It has been contended that it was given for the purpose of paying persons from whom the loan was bought. This could not be, because the city did not contract with those persons directly or indirectly. They could have no claim against the city. In making these purchases, Jones had expressly stipulated that the seller should not have any reason to believe he was dealing with the city. If this was otherwise, it is enough for the present case that there is no evidence from which it may be properly inferred. The right of stoppage *in transitu*, which the Commonwealth argued remained in the city, does not show that property in the cheque did not pass. On the contrary, it proves that it did. This right could only be exercised upon the ground that the cheque was given in pursuance of a contract. An appeal to this right always evinces that property in the thing had passed to the holder, otherwise there would be no need thus to reclaim it. If these views be

sound, it follows that not only possession, but property, in the cheque passed to the defendant. If this be not so, under which of the classes of cases does this transaction fall? The cheque was not placed in the custody or charge of the defendant. It was not delivered to him for a specific purpose. It was not given to remain, in the presence of the agent of the city. It was not a deposit as a stake. The property in the cheque, therefore, having passed to the defendant, no matter how fraudulent the means whereby he obtained it, whatever his offence may be, it is not larceny. If the Commonwealth's case be reliable, it comes within and fits exactly the terms by which false pretences are defined by our Act, which is as follows: "If any person shall, by any false pretence, obtain the signature of any person to any written instrument, or shall obtain from any other person any chattel, money, or other security, with intent to cheat and defraud any person of the same, every such offender shall be guilty of a misdemeanour." The defendant offered to show that upon transactions similar to this, with the knowledge and consent of the agent of the city, bills were made out, and cheques given to him before the loan was bought. This evidence tended to show the nature of the business and the interpretation which both parties may have been supposed to have placed upon it. It furthermore tended to take away or explain what otherwise would be a fraudulent misrepresentation. For these reasons the testimony should have been received. Under the case as presented by the Commonwealth there was perhaps nothing left for the judge but to charge as he did. It was the only way in which the question of law could be reserved. But if, as we have endeavoured to show, the law is, that no larceny exists when the property passes, the distinctions which arise between mere possession and property should have been presented to the jury. It is not obvious that the jury had a right to consider the fact of the large indebtedness of Mr. Yerkes to the city in determining his intent or motive. Undoubtedly, whatever may be an inducement or temptation to the commission of an offence may be given in evidence as indicating the motive or intent. Therefore, where a crime is committed for the possession of money, as in *Winne-more's case*, the necessities of the person charged for money would be proper subjects of consideration; or where a debtor is charged with the homicide of a creditor, as in *Webster's case*, the necessities of the debtor and the relentless and persistent pursuit of the creditor may be given in evidence. But there was no evidence that the city had demanded, or was about to demand, the money due by the defendant. How can the fact that a man owes another a large amount of money, establish, or tend to establish, the motive or intent to cheat him in a subsequent transaction? Besides, the Act of Assembly makes this very indebtedness a crime. It arose from a loan of the city funds, which in express terms is declared to be a crime. To permit this indebtedness to enter into the deliberations of the jury, either by evidence, or argument, or

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otherwise, was to attempt to establish one crime by proof of another and was therefore irregular and vicious. There was no evidence to sustain the second, third, and fourth counts, and yet the jury convicted upon them. What reliance, then, can be placed upon their finding upon the first count? If they thus trifled with the rights of the defendant upon the other three counts, the inference is irresistible that they may have so acted in regard to the first count. When there is no evidence to sustain a count not defective, a due regard to the rights of the defendant would require that it should be withdrawn. The mere fact of its submission to the jury may affect their minds in the consideration of the counts upon which evidence has been offered. In a matter of so much importance to the public and to the defendant, it is a source of painful regret that there should be any difference of opinion. I have been anxious to test my own views by the closest scrutiny. They still remain my firm and conscientious opinions ; and, however unsatisfactory they may be to others, I cannot hesitate to pronounce them. They satisfy me that the defendant was not convicted "according to law," and therefore the rule for a new trial should be made absolute.

Dissenting opinion by LUDLOW, J. :

I am obliged to dissent from the judgment of the majority of the court. Under the evidence in this case, I am of the opinion, that if a crime was committed, it was not that known as larceny. Yerkes was employed by the city to purchase its securities for the sinking fund, and it is admitted that, for a very good reason, he was not to be known in the market as the agent of the city. No special order was given to buy at any particular time, but he purchased, from time to time, as the exigencies of the case might require, and in this way the value of the city securities was kept at par. The vendors of the City Loan knew only Yerkes, and while it is true that the city might be held responsible, when discovered to be the principal in the transaction, it is equally the law that the vendor had the right to hold the agent, and the agent alone, responsible. It is, moreover, a fact, that Yerkes had, as an independant transaction, bought large quantities of City Loan for some purpose. It is not an answer to this statement, so far as it bears upon this transaction, to declare that Yerkes had also sold larger quantities of city securities, for, taking into consideration the fact that the defendant was an active broker, engaged in buying and selling City Loan in large quantities, it is impossible, from the evidence, to come to the conclusion either that Yerkes did not intend shortly to deliver the loan, or that Jones, the chief clerk, or the City Treasurer, did not intend to part, not only with the possession, but also, and absolutely, with the property in the cheque, and the money represented by it, when by the evidence in the cause, Yerkes presented a bill for loan bought by him for the city ; or in other words, it is to my mind quite impossible, from the evidence, to believe that Yerkes

intended, by trick or otherwise, simply to steal the money. If he did not, the crime, if any, was *not larceny*. In a moral point of view it may be very wrong for a broker to depend upon a future contingency to deliver stock or City Loan; but unless at the time this defendant received this cheque he intended to play a fraudulent trick upon the City Treasurer, the offence, even according to the views of the majority of the court, as I understand them, would not be *larceny*; that is, a felonious taking, by a trick, of the cheque, with a formed intent then and there, at that time, to appropriate the money and deliver the loan. In my judgment, the doctrine now announced by a majority of the court extends the crime of constructive larceny to such limits, that any business man, who engages in extensive and perfectly legitimate transactions, may, before he knows it, by a sudden panic in the market become a felon. When a principle is asserted which establishes such a precedent, and may lead to such results, to say the least of it, it is startling. If the crime charged had been that of a conspiracy, or receiving a loan of public money, or possibly obtaining money under false pretences, a much more serious question might have been presented for our consideration. As it is, upon the law and the facts in evidence, I cannot call this case one of larceny, and therefore I respectfully dissent from this judgment. In addition to what has been said, I also endorse the views of my brother Finletter, whose opinion has so far explained the law and the facts as to render any further discussion of the subject unnecessary.

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False
Pretences.*

Conviction affirmed.

WARWICKSHIRE SPRING ASSIZES.

CROWN COURT.

(Before Mr. Justice KEATING.)

February 28, 1872.

REG. v. SARAH REASON.(a)

Evidence—Admission of prisoner—Inducement.

The words "I must know more about it," said by a police-constable to a prisoner in the course of a conversation between them respecting the subject matter of the charge, immediately before apprehension, are not a sufficient inducement to exclude an admission.

Duties of a police officer as to questioning a prisoner.

THE prisoner, Sarah Reason, was indicted for the murder of her child.

It appeared that the child was found drowned in a canal, and a police-constable, who was about to apprehend the prisoner, put questions to her and obtained statements from her with reference to the circumstances of the case. In the course of the conversation he said to her, "I must know more about it;" after which the following admission was made by her, "I did do away with it in the canal at Warwick."

Leigh for the prosecution.

Buszard for the prisoner.

The prisoner's counsel submitted that the words "I must know more about it" amounted to an improper inducement sufficient to exclude the subsequent admission from being put in evidence. He cited from Taylor on Evidence (4th edition), as follows: "The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point, being in its nature preliminary, is, as we have seen, addressed to the judge, who will require the prosecutor to show affirmatively to his satisfaction that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, will reject the confession"—p. 754. "In these cases

(a) Reported by H. F. POOLEY, Esq., Barrister-at-Law.

as the authority possessed by the persons who make or sanction the inducement is calculated both to animate the prisoner's hopes of favour, and, on the other, to inspire him with awe, and in some degree to overcome the power of his mind, the law assumes the possibility, if not the probability, of his making an untrue admission, and, consequently, withdraws from the consideration of the jury any declaration of guilt which the prisoner under these circumstances may be induced to make. Moreover—and this is a more sensible reason for the rule—the admission of such evidence would naturally lead the inferior agents of the police, while seeking to obtain a character for activity and zeal, to harass and oppress unfortunate prisoners in the hope of wringing from them a reluctant confession”—p. 755.

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KEATING, J. (after consulting with Quain, J.) said: I have thought it right to consult with my brother Quain, and he is very clear that it would be quite an over-refinement to exclude this admission. I agree with him, and indeed did not feel much doubt in my own mind. In my time it used to be held that a mere caution given by a person in authority would exclude an admission, but since then there has been a return to doctrines more in accordance with the common sense view. The real question is whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth from fear of the threat, or hope of profit from the promise. In the present case the police-constable was stating his reason for making further inquiries, and it would be straining the rule to an unnatural extent to exclude the admission, especially as it was a statement made in the course of a narrative.

In the course of his summing up the learned judge further observed: “It is the duty of the police-constable to hear what the prisoner has voluntarily to say, but after the prisoner is taken into custody it is not the duty of the police-constable to ask questions. So, when the police-constable has reason to suppose that the person will be taken into custody, it is his duty to be very careful and cautious in asking questions.”

Evidence admitted.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

July 27, 1872.

(Before Mr. Justice QUAIN.)

REG. v. CHRISTOPHER EDWARDS. (a)

Evidence—Murder—Statements of deceased—Res gestæ.

On the trial of a prisoner for the murder of his wife, a neighbour swore that a week before the alleged crime was committed the deceased visited her house, bringing an axe and carving knife, and gave them to her to take care of.

Held, that the evidence of what was said by the deceased to the witness on handing her the instruments was admissible.

PRISONER was indicted for the wilful murder of his wife Rosannah, on the 30th of April.

Boughey prosecuted.

Motteram defended the accused.

Evidence was given tending to prove that the prisoner often beat his wife, and had killed her with a poker.

A neighbour, called as a witness, stated that on the 22nd of April, a week before the alleged murder, the deceased came into her house with a carving knife and a large axe. QUAIN, J. ruled that evidence of what was then said by the deceased to the witness was admissible. Whereupon, the witness being allowed to continue, added: "She said, 'Please to put them up, and when I want them I'll fetch them, for my husband always threatens me with these, and when they're out of the way I feel safer.'"

The prisoner was found guilty and executed.

Attorney for the prosecution, *Hand*, Stafford.

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

July 29, 1872.

(Before Mr. Justice QUAIN.)

REG. v. WALTER BOOTH. (a)

24 & 25 Vict. c. 100, s. 55—*Abduction—Motive—Evidence.*

One who takes an unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother, is guilty of an offence under 24 & 25 Vict c. 100, s. 55, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go.

PRISONER was indicted for the abduction of Mary Ann Johnson, an unmarried girl under sixteen years of age.

H. D. Greene prosecuted.

Kenealy, Q.C., defended the accused.

The prosecutor's daughter, a girl of about fifteen years old, was in the employ of the prisoner, a manufacturer, who induced her to leave her home, without the knowledge or consent of her parents, and, by proposing marriage, to accompany him by train to a town about thirty miles distant, where he left her at a respectable house. She went away with him willingly, and, following his instructions, told the people with whom she was lodged that her father had threatened to send her to a convent. The girl was recovered *virgo intacta*. It appeared that the prisoner was a married man, of excellent character, and that the prosecutor was a Roman Catholic.

The defence raised was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order to save her from seclusion in a convent; and that he had no means of ascertaining her age.

QUAIN, J., summed up.—The prisoner is indicted under 24 & 25 Vict. c. 100, s. 55, which enacts that "whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law

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will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanour." The law is perfectly clear, and well established by decisions upon that section. You have nothing to do with what was the prisoner's motive in taking this girl away. It is utterly immaterial whether he thought her eighteen years of age or less. If he undertook the responsibility of taking an unmarried girl out of her father's house, though she consented to go, and he had no bad motive, and although he did not know her to be under the age of sixteen, he is responsible for his act. His motives, his philanthropy, and the fact that she was willing to go, have nothing to do with the question before you. It was said by the learned counsel for the prisoner that this statute was procured by the Bishop of Oxford; if it were so, I venture to add publicly that we are all deeply indebted to the right reverend prelate for the same. That a man should interfere in another's household, invade the sanctity of his home, and deprive parents of their child from motives of philanthropy, would be a most dangerous doctrine. What right has a man to go into his neighbour's house and interfere between a child and parents, who are by nature the proper persons to protect their offspring? Even if the father had wished to place her in a convent, what was that to the prisoner? Are there no magistrates and officers of the law to whom the girl might appeal if her father exerted his authority wrongfully? I think the provisions of this statute afford an excellent protection to every man's house. The real issue for you to try is simply this: was the girl induced to leave her father's house by Booth? Was she taken out of the possession and keeping of her father without her father's consent? That she left without her father's or mother's consent is clear. Did he take her away?

Verdict guilty. Sentence eighteen months' imprisonment.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

July 29, 1872.

(Before Mr. Justice QUAIN.)

REG. v. JAMES YATES. (a)

Libel—Pleading—Indictment—Inuendo.

An indictment which charged that the prisoner printed and published a libel of and concerning B. O., the prosecutor, according to the tenor and effect following, viz.: "B. O. of C. (meaning the said B. O.), Game and Rabbit Destroyer, and his wife (meaning Charlotte, the wife of the said B. O.), the seller of the same in country and town"—

Held bad, for want of innuendoes, or averments shewing that the words alleged to be defamatory charged an indictable offence, or had reference to the calling of the prosecutor.

INDICTMENT charged that James Yates, unlawfully and maliciously contriving and intending to injure, vilify, and prejudice one Benjamin Oakley, and to deprive him of his good name, fame, credit, and reputation, and to bring him into public contempt, scandal, infamy, and disgrace, on the 19th of March, A.D. 1872, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a false, scandalous, malicious, and defamatory libel, in the form of a handbill, containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said Benjamin Oakley, according to the tenor and effect following (that is to say): "B. Oakley, of Chillington (meaning the said Benjamin Oakley), Game and Rabbit Destroyer, and his wife (meaning Charlotte, the wife of the said Benjamin Oakley), the seller of the same in country and town," he, the said James Yates, then well knowing the said defamatory libel to be false, to the great damage, scandal, and disgrace of the said Benjamin Oakley, and against the peace, &c.

Underhill, for the prisoner, applied to the Court to quash the indictment. The alleged libel set out therein was not a libel. It

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

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did not impute to the prosecutor any indictable offence nor anything against his character in a particular capacity, nor anything which tended to degrade him, or make him ridiculous, or bring him into public contempt. It was consistent with the indictment that the prosecutor might be a man in the habit of killing game without any wrong in so doing.

QUAIN, J.—A destroyer of game and rabbits *on his own land* is quite free from blame. There is no averment shewing that it is an indictable offence.

Hon. Evelyn Ashley, for the prosecution.—A written statement is a libel if it conveys to the minds of the persons to whom it is published a libellous defamation of another individual. The prosecutor was a gamekeeper, and the suggestion evidently is that he kills his master's game and his wife sells it improperly. The keeper is called a *Game Destroyer*, an epithet which is only applied to one who kills game improperly. The crime or offence need not be directly charged in the libel, an indirect defamation will suffice: (Archbold, Pleading and Evid. p. 859.)

QUAIN, J.—I think this indictment is bad. The handbill set out therein is not *primâ facie* libellous, and there is no averment or inuendo shewing that it charges an indictable offence, or relates to the calling or occupation of the prosecutor.

Indictment quashed.

Attorney for the prosecution, *Glover*, Walsall.

Attorney for the prisoner, *Turner*, Wolverhampton.

OXFORD CIRCUIT.

STAFFORD SUMMER ASSIZES.

July 30, 1872.

(Before Mr. Justice QUAIN.)

REG v. JOHN POWNER. (a)

*Forgery—Process of Court, 24 & 25 Vict. c. 98—Indictment—
Allegation of “intent to defraud.”**24 & 25 Vict. c. 98, s. 28, enacts that “whosoever shall forge or fraudulently alter any process of any Court” (with certain exceptions), “shall be guilty of felony.”**Held, that an indictment for forgery under that section must allege an intent to defraud.*

INDICTMENT charged that John Powner, on the 14th of March, A.D. 1872, feloniously did forge certain process of a Court of Petty Sessions of Her Majesty's Justices of the Peace (to wit) an order made and issued by virtue of the provisions of the statute made and passed in the 8th year of the reign of our said Lady the Queen, intituled, “An Act for the further amendment of the Laws relating to the Poor in England,” under the hands and seals of two of Her Majesty's Justices of the Peace, ordering one Samuel Easthope, amongst other things, to pay unto one Hannah Shakespeare, the mother of a certain bastard child, the sum of 18s. 8d., being the costs incurred in obtaining the said order; against the form of the statute.

Second count.—That the said John Powner having in his custody and possession certain process of a Court of Petty Sessions, to wit (the order aforesaid), afterwards, to wit, on the same day and in the year aforesaid, feloniously did fraudulently alter the said last-mentioned process, by erasing the word “sixteen” therein, and substituting therefor the word “eighteen;” against, &c.

Third count.—That he, on the same day, did feloniously serve upon the said Samuel Easthope certain forged process of a Court of Petty Sessions, &c. (to wit, the said order), he, the said John Powner, at the time when he so served the said last-

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mentioned forged process, then well knowing the same to be forged ; against, &c.

The prisoner, a sergeant of police, having received from the Clerk to the Justices a bastardy order, wherein the amount of costs was written 16s. 8d., and being instructed to serve the order upon the person therein named, altered the amount to 18s., served the order, received 18s., and kept back 2s. of it. At the close of the case for the prosecution, the learned Judge called the attention of counsel to the fact that the indictment contained no allegation of an intent to defraud.

George Brown, for the prosecution.—The indictment is founded on that part of 24 & 25 Vict. c. 98, s. 28, which enacts that “Whosoever shall forge the seal of any court of record, or shall forge or fraudulently alter any process of any court other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged . . . shall be guilty of felony.” And the courts mentioned in the preceding sect. 27, are courts of record or of equity or admiralty in England or Ireland. Sect. 44 of the same Act, which says that “It shall be sufficient, in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, *where it shall be necessary to allege an intent to defraud*, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person . . .” clearly shews that there may be cases where it is not necessary to allege such intent. The indictment is in the words of sect. 28. [QUAIN, J.—The second count alleging a fraudulent intention may suffice ; but my doubt is with regard to the first count. Is this order “any process of any court” within the terms of sect. 28 ? “Process” means final “process.” In sect. 32 relating to forgery of orders of justices, the words “with intent to defraud” are inserted.] An order of justices to pay money is the process of a court—a proceeding.

Kenealey, Q.C. (*Motteram* with him), for the prisoner, contended that the first count must fail for lack of an allegation of intent to defraud, and that the order was not a “process” within sect. 28.

His Lordship told the jury that if the prisoner fraudulently altered the sum from 16s. into 18s., meaning to retain the difference, that would be a forgery, and that service of the order on the person against whom it was made would be an enforcement of it, and left it to them to say whether the prisoner forged or altered and served the instrument with the intention of obtaining and keeping the 2s.

Verdict—Guilty of fraudulently altering the order.

QUAIN, J.—I am of opinion that the common law definition of forgery must be imported into sect. 28, and that the first count is

bad for not alleging an intent to defraud. But I think judgment will stand upon the second count, which is proved, and that the order of justices was a final process within the meaning of the section. As, therefore, the prisoner has been convicted of a felony under the second count, it will not be advisable to go on with the other charges.

Sentence, twelve months imprisonment with hard labour.

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NORTHERN CIRCUIT.

Manchester, July 30, 1872.

(Before Mr. Justice BRETT.)

REG. v. GIBBONS.(a)

Bigamy—Bonâ fide belief of death of husband—24 & 25 Vict. c. 100, s. 57.

A bonâ fide belief by a wife that her husband is dead is no defence to an indictment for bigamy, unless he has been continuously absent for seven years.

Reg. v. Horton (11 Cox C. C. 145, 670) overruled.

THE prisoner, Ann Gibbons, was indicted for bigamy.

Coventry was for the prosecution.

Foard was for the defence.

The first marriage took place in August, 1861, with a man called Henry Gibbons, a gilder by trade. He, after living with her for a few months, left her, saying that he was going abroad. She maintained herself by going out to service, and in the year 1867 she went into the employment of a man called Thomas Fisher, and on the 23rd of September in that year she was married to him telling him that she was a widow. From the time her husband left her up to the date of the second marriage she had never seen or heard of him. These being the facts of the case,

BRETT, J., asked the counsel for the prisoner what his defence was.

Foard said that if the prisoner had a *bonâ fide* belief that her

(a) Reported by H. F. THURLOW, Esq., Barrister-at-Law.

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husband was dead, which was a question for the jury, she ought to be acquitted.

BRETT, J.—*Bonâ fide* belief will not do unless the first husband has been absent for seven years. The 57th section of 24 & 25 Vict. c. 100, is perfectly clear as to its meaning.

Foard said there were two cases which decided that if there was a *bonâ fide* belief that the husband was dead, although the seven years had not elapsed, the prisoner was entitled to an acquittal. He cited *Reg. v. Turner* (9 Cox C. C. 145), tried before Martin, B., and *Reg. v. Horton* (11 Cox C. C. 670), tried before Cleasby, B., and in both of these cases the two learned judges held that if the prisoner at the time of the second marriage had a *bonâ fide* belief that the first husband was dead, the prisoner ought to be acquitted.

BRETT, J., then consulted Willes, J., who was sitting in the Civil Court, and on the learned judge's return he said that both he and Willes, J., were of opinion that a *bonâ fide* belief that the husband was dead was no defence unless the seven years had elapsed.

Foard.—Will your Lordship grant a case for the Court of Criminal Appeal?

BRETT, J.—No; I think the point is quite clear. The words of the statute are express.

MIDDLESEX SESSIONS.

October 1, 1872.

(Before Mr. Serjt. Cox.)

REG. v. MADDEN AND HAMPTON.

Practice—Summing up by counsel.

Where one of two prisoners jointly indicted is defended by counsel, and without claiming his right to sum up by the counsel for the prosecution, the undefended prisoner has addressed the jury, the counsel for the prosecution may not afterwards sum up the case to the jury as against the defended prisoner.

PRISONERS were indicted for larceny.

Ribton for the prosecution.

Sleigh for Hampton.

Madden was undefended.

At the close of the evidence for the prosecution, the undefended prisoner, whose name was first in the indictment, was called upon for his defence. He addressed the jury, but called no witnesses.

Ribton then claimed to sum up as against the defended prisoner before his counsel addressed the jury. He cited the provisions of 28 & 29 Vict. c. 18, s. 2, which enacts "that if any prisoner is defended by counsel, the judge shall, at the close of the case for the prosecution, ask the counsel for each prisoner if they intend to adduce evidence, and if none of them does so, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case for the purpose of summing up the evidence against such prisoner or prisoners." He claimed to sum up only as against the prisoner who was defended, and whose defence had not yet been entered upon.

Sleigh objected.

The JUDGE.—The application comes too late. The right to sum up is at the close of the case for the prosecution, and before the defence has been entered upon. Here the case for the prosecution was concluded and the defence had begun, and was in part heard. If one prisoner only had been on his trial, it would be quite clear that the prosecution could not sum up now, and the position is not altered by the circumstance that there is another prisoner who has not yet made his defence.

OXFORD CIRCUIT.

STAFFORD WINTER ASSIZES.

November 3 and 4, 1872.

(Before Mr. Justice DENMAN.)

REG. v. EDWARD WOODHALL AND HUGH WILKES. (a)

24 & 25 Vict. c. 96, s. 42—*Assault with intent to rob—Indictment for felony—Verdict of a misdemeanour.*

Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged.

Held, that the prisoners could not, upon this indictment and finding, be convicted of a common assault.

EDWARD WOODHALL and Hugh Wilkes were indicted for feloniously assaulting Joseph Glover, on the 30th of September last, at the parish of West Bromwich, with intent to rob and steal from his person certain money.

A. Young prosecuted.

The prisoners were undefended.

The jury found the prisoners guilty of the assault, but not of the intent to rob.

Our. adv. vult.

Nov. 4.—DENMAN, J., said :—The jury yesterday, after hearing the evidence, found the prisoners guilty of a common assault, and I have taken time to consider the matter and to look into the law. The conclusion I have arrived at is, that the finding on this indictment in fact amounts to a verdict of not guilty, and that it is not competent for the Court, where the charge is one of assault with intent to rob, to convict and sentence the prisoners if the jury find them guilty only of a common assault. The case is one of considerable nicety, but the result of my examination of the authorities is as I have stated.

His Lordship then caused the prisoners to be bound over in their own recognizances to appear at a future Sessions to answer any charge of common assault which might be preferred against them.

A verdict of Not Guilty was recorded.

24 & 25 Vict. c. 96, s. 42 enacts, that "Whosoever shall assault any person with intent to rob shall be guilty of felony."

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

COURT OF CRIMINAL APPEAL.

November 22, 1872.

(Before KELLY, C.B., MARTIN, B., BRETT, J., GROVE, J., and QUAIN, J.)

REG. v. WILLIAM JONES.(a)

Evidence—Confession—Admissibility—Inducement.

Prosecutrix lost her purse, containing 1l. 4s., in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen any one pick it up. He replied that he had not. She, however suspecting that he had robbed her, gave information to the police. A policeman, a short time after, went in search of prisoner, and having found him, told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, "Now is the time for you to take it back to her." He denied having it, and went with the policeman. As they walked along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about 600 yards, some conversation took place, and the prisoner was searched, and on a half sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, "Now is the time to take it back to her" and the prisoner's statement, "that he would make it all up to her:"

Held, that there was no inducement held out to the prisoner, and that his statement or confession that he would make it all up to her was admissible in evidence against him.

CASE reserved for the opinion of this Court at the Midsummer Quarter Sessions for the county of Cardigan, on the 3rd of July, 1872.

William Jones was tried upon an indictment charging him with stealing moneys to the amount of 1l. 4s., the property of one Edward Rees.

At the trial, it was proved that on the 22nd of April, 1872, Mrs. Jane Rees, the wife of the prosecutor, was with her mother in the market at Aberystwith. She there purchased some fowls,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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which she paid for with money which she took out of her purse, and after paying for them, she replaced the purse, containing 1*l.* 4*s.*, composed of two half sovereigns and 4*s.*, in her pocket. At the time when she paid for the fowls, Mrs. Rees observed the prisoner, who she previously knew by sight standing close by and near enough to see her take the money out of the purse, and there was no one but the prisoner near her at the time. Mrs. Rees resided a few yards from the market, and as soon as she got home she searched her pocket, and found her purse and money gone. She immediately returned to the market, and found the prisoner still there. She asked if he had seen the purse or seen any one pick it up. He said he had not; but Mrs. Rees, suspecting from several circumstances that the prisoner was the person who had robbed her, gave information to Sergt. Evans, of the Aberystwith county police, who went in search of the prisoner, and found him between six and seven o'clock the same evening, in the Welsh Harp publichouse, Aberystwith.

The evidence of Sergt. Evans, who was called as a witness for the prosecution, was as follows :—I found the prisoner at the Welsh Harp and called him out; I said Mrs. Rees had lost her purse, and that it was supposed he had picked it up. I said, "Now is the time for you to take it back to her." He denied having it, and used very strong language. This took place outside the Welsh Harp, in the street. I asked him what money he had; he said, eighteenpence. I went with prisoner to Great Dark-street. He commenced making a statement. I said, "Say nothing now until we see Mrs. Rees." At the end of Market-street we met Mrs. Rees and Elizabeth James. When we got up to them the prisoner said, "Do you say I have got your money?" She replied, "No, I do not say so; but you were the only person who was near me at the time I had lost it." He then declared he had not seen it, and said, "Might God strike him dead if he had seen it." I then said to him, "William, what money do you say you have about you?" He replied, "Eighteen pence." Being close by the yard, I said to him, "Come in here; if you are honest you will be none the worse for being searched." He then walked into the yard, Mrs. Rees being then close behind us. I said to him again, "Now, eighteenpence, you say, is all you have about you." He put his hands in his pocket and pulled out half-a-crown, a shilling, sixpence, and three halfpence. I counted the money, and said to him, "William, there is more than 1*s.* 6*d.* here." He replied, "Oh, yes, there is half-a-crown; I had forgotten about that." I then placed my hand in the prisoner's pocket, and found half a sovereign in gold. I said, "William, what is this?" He held down his head, and in a few seconds went forward to Mrs. Rees, and, crying, said, "Mrs. Jones (Mrs. Rees's name before her marriage), dear, I will make it all up to you." I had said to the prisoner, "Now is the time to take it back to her," twenty minutes before the time when the prisoner said to Mrs. Rees that he would make it all up to her. It is a

distance of about 600 yards between the Welsh Harp and the place where the prisoner made this remark to Mrs. Rees.

Upon this evidence it was objected by the advocate for the prisoner that the remark of Sergt. Evans to the prisoner, "Now is the time for you to take it back to her," amounted to an inducement, and was therefore inadmissible in evidence against him.

The Court overruled these objections, and left the evidence of Sergt. Evans, with the rest of the case, to the jury, who found the prisoner guilty.

Upon the application of the advocate for the prisoner, the Court decided to reserve the question of law for the consideration of the Court for Crown Cases Reserved, whether, upon the above facts, the statements made by the prisoner were admissible in evidence against him, and whether the prisoner was properly convicted; and, in the meantime, sentence was postponed, and the prisoner liberated on bail.

(Signed) C. MARSHALL GRIFFITH,
Chairman of the Cardiganshire Quarter Sessions.

No counsel appeared for the prisoner.

Blofield, for the prosecution.—Two points arise. First, was there any inducement to confess by a promise or threat held out to the prisoner? Secondly, was the confession involved in the statement made by the prisoner, that he would make it all up to the prosecutrix, caused by the inducement, there being an interval of twenty minutes? As to the first point; the words of the policeman, "Now is the time for you to take the purse back to her" (the prosecutrix), do not import any promise or threat to the prisoner to confess. [He was then stopped by the Court.]

KELLY, C.B.—It is quite clear that these words import no promise or threat to the prisoner to confess.

The other Judges concurred.

Conviction affirmed.

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*Evidence -
Confession -
Inducement.*

COURT OF CRIMINAL APPEAL.

November 23, 1872.

(Before KELLY, C.B., MARTIN, B., BRETT, J., GROVE, J., and
QUAIN, J.)

REG. v. LOCK.(a)

Indecent assault—Consent—Submission—Child of tender years.

The definition of an assault that the act must be “against the will” of the patient implies the possession of an active will on his part.

Therefore, mere submission by a child of tender years to an indecent assault without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of the criminal law.

AT the General Session of the peace for the County of Middlesex, on the 4th June, 1872, James Lock was tried upon an indictment which charged him with indecently assaulting Frederick William Sandell and George Goodge.

It was proved by three witnesses that they saw the defendant in a field by the Edgware-road take each of the boys in succession upon his legs, play with their private parts, unbutton his trousers and theirs, lie upon them, and move himself about as if in the act of having connection with a woman.

The two boys, each of whom was only eight years old, proved that the defendant met them in the Edgware-road, said he would take them to some fireworks, gave them biscuits and some beer, took them into the field, went up to a wall to which they followed him, there sat upon the grass, placed them successively upon his lap, laid his hand on their private parts, unbuttoned their trousers and his own, threw them down on their backs and lay upon them, moving himself in an indecent manner, which one of the boys described by a gesture. The defendant was interrupted by the coming up of the three witnesses, when he told the boys not to tell. The boys were not asked by the counsel on either side if it was done against their will or with their consent, but they stated that they did not know what the defendant was going to do to them when he took them into the field and placed them on his lap and laid them on the ground.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

On these facts it was contended by the counsel for the defendant that there was no case for the jury, inasmuch as the filthy acts were not done against the will of the boys.

Having determined that it was a question for the jury, in summing up I stated to them that the law recognised a distinction between mere submission and positive consent. That a person may submit to an act done to him from ignorance, or his consent may be obtained by fraud, and in neither case would it be such a consent as the law contemplates. That consent means an active will in the mind of the patient to permit the doing of the act complained of; and that knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act. That it had been contended that, inasmuch as an assault must be an act done against the will of the patient, and the boys did not expressly dissent, there was no assault; but that this assumes a consenting will on their parts, and both stated that they did not know what the defendant intended to do, nor the meaning of what he was doing.

The facts of the case were undisputed, and the question I left to the jury was whether, in their judgment, the boys merely submitted to the filthy acts, ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it, and consented to what the defendant did. In the former case they would find the defendant *Guilty*. In the latter case they would acquit him.

The jury found the defendant *Guilty*, stating that they did so, being of opinion that the boys merely submitted to the act of the defendant, not knowing the nature of such act.

The question being of frequent recurrence, and the law appearing to be unsettled, on the application of counsel for the defendant, I reserved for the opinion of this Honourable Court the question whether the definition of an assault "that it must be an act done against the will of the patient" extends to the case of submission to the act through ignorance of its nature and where there was no positive exercise of the will in the way of dissent, or if the actual exercise of an actual dissenting will is necessary to be proved in order to constitute an assault.

If it should be the opinion of the Honourable Court that the direction to the jury was wrong, the conviction will be quashed. If right, it will be confirmed. The prisoner was admitted to bail.

(Signed) EDWD. WM. COX,
Deputy Assistant Judge of Middlesex.

No council was instructed for the prisoner.

Metcalfe for the prosecution.—There is a well established distinction between positive consent and mere submission to an indecent assault. In *Reg. v. Day* (9 Car. & P. 722) upon an indictment for attempting to abuse a female child under the age of ten, containing a count for a common assault, it appeared that

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the prisoner made an attempt upon her without any violence on his part or actual resistance on hers, and it was contended that as she offered no resistance it must be taken that she consented, but Coleridge, J. said "There is a difference between consent and submission: every consent involves a submission, but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting: on the other hand the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law." So in *Rex v. Nichol* (Rus. & Ry. 130) where a master took indecent liberties with a female scholar of the age of thirteen, and she did not resist, but it was against her will, the Judges on a case reserved were of opinion that the master was guilty of an assault. So where a medical man had connection with a girl of fourteen years of age under the pretence that he was thereby treating her medically for the complaint for which he was attending her, and she made no resistance, this was held to amount to an assault, and *semble* also to a rape (*Reg v. Case*, 5 Cox C. C. 222; 1 Den. C. C. 580). So where a man obtains carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, although it is not a rape, yet it has been held to be an assault (*Reg. v. Williams*, 8 C. & P. 286). There cannot be consent to the act without some knowledge of what is about to be done. So in the case of an idiot girl incapable of giving consent from defect of understanding, if the act be found to have been done forcibly, although not against her will, it will amount to rape: (*Reg. v. Fletcher*, 8 Cox C. C. 131; Bell's C. C. 63). The cases of *Reg. v. Bennett* (4 Fos. & Fin. 1105) and *Rex v. Rosinski* (Mood. C. C. 19) were also referred to.

KELLY, C.B.—I am of opinion that the conviction should be confirmed. This is not an indictment for a rape, but the question before us arises upon an indictment for an indecent assault, and it is whether mere submission to an indecent act without consent, the circumstances being such that the person assaulted was unable to exercise his will either one way or the other, relieves the other party from criminal liability; and whether the facts proved in this case, although done without fraud towards the patient, do not make out the charge of indecent assault, the patient being unable to exercise his will, there being no actual consent on the one hand, and on the other hand no actual fraud to induce consent. Where a child submits to an act of this kind in ignorance, the offence is similar to that perpetrated by a man who has connection with a woman while asleep. If that were not an assault, our law would be very defective. In such a case consent is out of the question, for a woman whilst asleep is in such a state that she cannot consent, and the act of connexion with her under the circumstances is quite sufficient to constitute an assault. There has been no decided case like the present, but

there are many cases which show that having connexion with a woman whilst asleep or by a fraud which induces the woman to suppose that it is her husband, amounts to an assault. In the present case the acts were done to children, and they were unconscious of the nature of the acts which the prisoner did or was about to do, and were therefore not in a condition to exercise their wills one way or the other, and I think that the acts done by the prisoner amounted to an assault.

MARTIN, B.—I am of opinion that treating these children in the way in which the prisoner did *primâ facie* amounts to an assault. The case is analogous to *Rex v. Nichol*, where a master took indecent liberties with a female scholar without her consent, and was held guilty of an assault although she did not resist.

BRETT, J.—The acts done by the prisoner were done to boys of a tender age, and are said by the prosecution to amount to an assault. I agree that to amount to an assault the acts must have been done against the wills of the boys. The question we have to decide is whether the learned Deputy Assistant Judge gave a proper definition of what constituted consent to the jury. If the boys had consented to the acts, although ignorant of their nature, they would not have amounted to an assault, for it was necessary to show that the acts were against their consent. But did they consent? The jury were told substantially that if they in their judgments thought that the boys merely submitted to the filthy acts of the prisoner in ignorance of what was about to be done, or of the nature of them, and did not consent, the prisoner was guilty of an assault. It seems to me that mere submission under such circumstances is not consent, and that if a person of mature years does such acts to children of tender years, and knows that they do not consent, that is sufficient evidence that the acts are done against their will. I think, therefore, that the direction to the jury was right.

GROVE, J.—I am of the same opinion. I do not think that an exercise of an actual dissenting will is necessary to constitute an assault in a case like this. The acts done must be in some sense against the will of the patient. Dissent may be either positive or negative. If positive dissent is necessary, the direction to the jury was wrong; if an active dissent is not necessary, the direction was right. I think that negative dissent is enough, and that mere submission in ignorance of the nature of the act done does not differ from negative dissent.

QUAIN, J.—The finding of the jury that the boys did not know the nature of the acts done, clearly shows that they did not consent to the acts done. And all the cases decide that to exonerate the prisoner in such a case consent is necessary. I think, therefore, the direction was right.

Conviction affirmed.

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—
Assault.

COURT OF CRIMINAL APPEAL.

*November 23, 1872.**(Before KELLY, C.B., MARTIN, B., BRETT, J., GROVE, J., and QUAIN, J.)*

REG. v. GUMBLE.(a)

Indictment—Amendment—Description of thing stolen—14 & 15 Vict. c. 100. s. 1.

An indictment charged the prisoner with stealing nineteen shillings and sixpence in money of the prosecutor. At the trial it was objected that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything, it was of stealing a sovereign. Thereupon the Court amended the indictment by striking out the words "nineteen shillings and sixpence," and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of stealing a sovereign.

Held, that the Court had power so to amend under 14 & 15 Vict. c. 100, s. 1.

CASE reserved at the General Quarter Sessions of the peace holden at St. Mary, Newington, in and for the county of Surrey, on the 3rd of July, 1872.

James Gumble was indicted for stealing, on the 29th of May, 1872, 19s. 6d. from William Jackson Walton.

The prosecutor had been playing at throwing sticks at cocoa nuts at Epsom Downs, and had to pay the prisoner sixpence, but having nothing less than a sovereign, he said to the prisoner "Have you change for a sovereign?" The prisoner said "Yes," and in consequence of that prosecutor gave him a sovereign. He then pulled some money out of his pocket and said "I haven't enough, I'll go and get it for you. I won't be a minute; just wait here."

The prosecutor waited nearly an hour for the prisoner, and then went for a policeman, leaving a friend who had been with him at the time, to wait for the prisoner. This he did for quite another hour after the prosecutor went for the policeman.

The prisoner's son removed the sticks and the cocoa nuts at the expiration of the first hour.

The prisoner did not return, and was not apprehended until

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

the following Saturday, the 1st of July, on which occasion, when he saw the prosecutor's friend, he immediately ran away, and was only captured after a chase of some distance. On his apprehension 4*l.* 10*s.* was found upon him.

It was objected by the prisoner's counsel that there was no case against the prisoner. For if he were guilty of any offence he was guilty of stealing a sovereign, and that the Court had no power to amend the indictment.

I allowed the case to go on, and put it to the jury that if they believed that the prisoner at the moment of obtaining the sovereign intended by a trick feloniously to deprive the prosecutor of the possession of the sovereign, they were to find him guilty.

They found him guilty, and then the following questions were reserved for the decision of the Court for Crown Cases Reserved :

1. Whether the prisoner, being found guilty of stealing a sovereign, could rightly be convicted under an indictment charging him with stealing 19*s.* 6*d.* ? and also,

2. Whether the Court would have had the power to amend the indictment at an early stage of the case ?

WM. HARDMAN, Chairman of the Court.

In the indictment the prisoner was charged with stealing "nineteen shillings and sixpence in money of the property of William Jackson Walton."

No counsel appeared for the prisoner.

J. Thompson for the prosecution.—Although the thing stolen was the sovereign, the indictment is sufficient and no amendment was required. By the 14 & 15 Vict. c. 100, s. 18, it is enacted that "in every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without allegation so far as regards the description of the property, specifying any particular coin or bank note ; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note shall not be proved." Therefore, it not being requisite to charge the prisoner in the indictment with stealing a sovereign, the indictment was proved because the proof of a stealing of the value of the sovereign would necessarily include the stealing of 19*s.* 6*d.* Assuming, however, that not to be so, the allegation of "nineteen shillings and sixpence" may be struck out as surplusage, and then, under the above section, the indictment would be good, charging generally the stealing money of the prosecutor. For by the above enactment it was not essential to allege the specific sum, nor was it necessary to prove it. Among the instances of surplusage in the books are the following: Where a man was charged with

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committing arson in the night time, and it was proved that he committed it in the day time, the time charged was treated as surplusage: (*Rex v. Minton*, 2 East. P. C. 1021.) So upon an indictment for having in possession a die made of iron and steel, it was holden immaterial of what the die was made, and that proof of a die made of either or both would satisfy the charge: (*Rex v. Oxford*, Rus. & Ry. 382.) *Reg. v. West* (7 Cox C. C. 183, D. & B. 109) was also cited. [KELLY, C. B. (after the Court had conferred together), said they wished to hear the argument as to the power of the Court to amend, taking it as the Court did, that the indictment was amended by the Court below at an earlier stage of the trial by striking out "nineteen shillings and sixpence," and inserting "one sovereign."] On that point the first section of the 14 & 15 Vict. c. 100, applies, which provides that whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof in (*inter alia*) the name or description of any matter or thing therein named or described, it shall be lawful for the Court on the trial to order the indictment to be amended according to the proof. The allegation of nineteen shillings and sixpence was the description of the thing charged as stolen, and, if the proof varied, it was amendable.

KELLY, C. B.—We are all agreed that under sect. 1 of the 14 & 15 Vict. c. 100, the Court had power to amend the indictment, and on the terms of the case we take it that the Court did amend the case by striking out the words "nineteen shillings and sixpence," and inserting the words "one sovereign," but reserved the point as to its power to do so at the request of the prisoner's counsel. I do not wish it to be understood that I am of opinion that the conviction might not have been sustained upon the original indictment independently of any amendment.

MARTIN, B.—I also think that sect. 1 authorised the Court to amend in this case. But under sect. 18, I think that the indictment could not have been sustained, as there was a variance in the proof.

BRETT, J.—I think that the words "nineteen shillings and sixpence" were a description of the thing charged as stolen, and without determining what the effect of that is, or whether an amendment was necessary, I think that under sect. 1 the Court had power to amend in this case, and I take it that the chairman did make the amendment here before verdict, and I therefore answer the second question in the affirmative.

GROVE and QUAIN, JJ., concurred.

Conviction affirmed.(a)

(a) See *Reg. v. Bird*, post, p. 257.

COURT OF CRIMINAL APPEAL.

Nov. 16 and 23, 1872.

(Before KELLY, C.B., MARTIN, B., BYLES, J., MELLOR, J.,
and BRETT, J.)

REG. v. WIDDUP.(a)

Evidence—Examination of trader under a liquidation—Admissibility—32 & 33 Vict. c. 71. ss. 96, 97.

A summons to examine a petitioner whose affairs were under liquidation by arrangement having issued under sect. 96 of 32 & 33 Vict c. 71, and he having appeared thereto and been examined, his examination is admissible in evidence on a criminal charge against him, whether the summons was regularly issued or not.

CASE reserved for the opinion of this Court by Cleasby, B.

The prisoner was indicted at the last Assizes held at Leeds, under the 14th and 15th sub-sections of the 11th section of the Debtors' Act, 1869, for that he, being a trader, within four months before the commencement of his liquidation, obtained property on credit under the false pretence of dealing in the ordinary way of his trade, and had not paid for the same; and that he being a trader within the like period of four months, disposed of, otherwise than in the ordinary way of his trade, property obtained on credit and not paid for.

At the trial an examination of the prisoner, taken before the Registrar of the Bankruptcy Court was tendered in evidence for the prosecution and objected to.

The following are the dates of the proceedings in liquidation.

The petition was presented on the 8th of June, 1872.

The first meeting of creditors was held, and appointment of trustee made 28th of June, 1872.

The registrar's certificate of the appointment of the trustee was dated 5th of July, 1872.

The prisoner was summoned to be examined under the 96th section of the Bankruptcy Act, 1869. The summons was issued on the 29th of June, and the prisoner attended in pursuance of it, and was examined on the 9th of July, and again by adjournment on the 12th of July.

The examination then taken was the one tendered in evidence.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The first objection was that the summons being issued before the certificate of appointment of trustee was not in compliance with the 96th section, and the examination taken under it obtained by an unlawful exercise of authority, and therefore inadmissible.

The summons was in the form 76 of the Bankruptcy forms.

Another objection taken was that the examination was taken by the registrar and not by the judge as directed by the 97th section, and that there was no proof that the judge had under the 67th section delegated to the registrar the power of taking the examination.

To this it was answered that the summons was issued by the Court, and that the place, viz., the Court House and time of examination, were named in it, and that as the examination took place at the time named before the registrar as a part of the proceedings in liquidation, it must be presumed he was then acting lawfully in taking the examination.

Another objection was, that so far as regards certain questions and answers in the examination, the question had a direct tendency to criminate the prisoner by proving the very charges upon which the indictment was framed.

Upon this subject the cases of *Reg. v. Scott* (7 Cox C. C. 164; 25 L. J. 128, M.C.), *Reg. v. Skeen* (8 Cox C. C. 142; 28 L. J. 98, M. C.), *Reg. v. Robinson* (10 Cox C. C. 467; L. Rep. 1 Cr. Cas. Res. 80) were referred to on behalf of the prosecution.

A fourth objection was that whatever the law may have been under former Acts of Parliament, yet under the present Act, as by sect. 108 the deposition is made evidence upon the death of the bankrupt, it ought not to be admitted during his lifetime.

A copy of the examination endorsed with my initials will be in the hands of the officer of the court to be referred to if necessary.

It was proved that each sheet of the examination was signed by the prisoner.

I admitted the whole of the examination.

The prisoner was convicted, but released on bail to appear at the next assizes.

If the whole examination was admissible in evidence the conviction is to stand. If the whole or any part was not admissible the conviction is to be quashed.

(Signed) A. CLEASBY.

Waddy (*Wilberforce* with him), for the prisoner.—The examination of the prisoner before the registrar was illegal, and therefore inadmissible, because the provisions of the statute 32 & 33 Vict. c. 71, ss. 96, 97, relating to such examination were not properly pursued. The cases cited at the trial have no application, as they were decided before the statute passed. Sect. 96 enacts that the court may, on application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt, &c., or any person known or suspected to have in his possession any of the estate or effects of

the bankrupt, &c. Then the 97th section enacts that the court may examine upon oath any person so brought before it in manner aforesaid concerning the bankrupt, his dealings and property. Now, the conditions prescribed in these two sections were not fulfilled. In this case the summons could not have issued on the application of the trustee, for though he was appointed on the 28th June, and the summons issued on the 29th June, yet by sects. 18 and 125 his appointment is to date from the day (5th July) of the certificate of the court declaring him to be trustee. Again, the summons is to be issued after the adjudication of bankruptcy by sect. 96, but here there was no adjudication of bankruptcy, the proceeding being a liquidation by arrangement under sect. 125. The summons, therefore, not being properly issued, the examination before the registrar was illegal for want of jurisdiction, and the answers were not voluntary in the sense requisite to render them admissible in evidence against the bankrupt. [MELLOR, J.—Was the defect anything more than an irregularity? If the objection had been made at the time of the examination, it might have been cured. MARTIN, B.—How could the bankrupt have objected to the jurisdiction of the Court? It was a proceeding under his own petition. BYLES, J.—If he had come voluntarily before the registrar and submitted to be examined, would there have been no jurisdiction? BRETT, J.—It may be that he was not bound to obey the summons, but he went, and there was then a legal trustee. Had not the Court jurisdiction, therefore?] There was no jurisdiction to administer an oath. Moreover, the examination should have been taken before the judge of the Court, and not before the registrar. Sect. 97 gives the power to the "Court," and in the interpretation clause (s. 4) a distinction is taken between the Court and the registrar. Sect. 67 enables the judge to delegate to the registrar or any other officer of the Court such of the powers vested in him as may be expedient. There was no evidence of any such delegation in this case. Further, the examination was conducted hostilely with a view to procure evidence for a criminal prosecution, and the answers to the questions were obtained by the influence of the threats of the party cross-examining (certain questions and answers were pointed out for this purpose). Besides, inducements were held out which prevented the answers being admissible: (*Reg. v. Baldry*, 2 Den. 430; 5 Cox C. C. 523; *Reg. v. Garner*, 2 Cox C. C. 175; 1 Den. 329; *Reg. v. Jarvis*, 10 Cox C. C. 574; L. Rep. 1 Cr. Cas. Res. 97; *Reg. v. Reeve*, 12 Cox C. C. 179.)

J. W. Mellor, in support of the prosecution.—First, the issuing of the summons was an irregularity merely, and did not render the examination wholly void. The examination was not until the 9th of July, when the title of the trustee had been certified. Under a liquidation by arrangement (sect. 125), the creditors appoint the trustee, and the registrar, if satisfied upon inquiry that the resolution for liquidation by arrangement was passed according to

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the Act, and that a trustee has been appointed, is bound to register the resolution, and then his certificate of the appointment of the trustee has the same effect as a certificate under sect. 18. The title of the trustee under a liquidation relates back to the filing of the petition: (*Ex parte Duignan*, 40 L. J. 33, 68, Bank.; 25 L. T. Rep. N. S. 286; *Re Isaac*, L. Rep. 6 Ch. App. 38; 23 L. T. Rep. N. S. 523.) Secondly, the irregularity in the summons was waived by the defendant's appearance. It has been held that by appearing to a bastardy summons irregularly issued the objection was waived, and the putative father might be indicted for perjury committed by him at the hearing of the summons: (*Reg. v. Fletcher*, 12 Cox C. C. 77; L. Rep. 1 Cr. Cas. Res. 320; *Reg. v. Shaw*, 10 Cox C. C. 166; 34 L. J. 10, M. C.) So in *Turner v. Postmaster-General* (34 L. J. 10, M. C.) it was held that where prisoners were in custody, and a different charge was investigated (upon which they were summarily convicted) to that for which they had been apprehended, it was held that no objection to this having been made at the time, the defect was cured. Crompton, J., said in that case "The rule applies as laid down in *Saunders's Case* (1 Wms. Saund. 272, note 1). The defendant's appearance will in this case, as in other cases of process, cure not only all defects and informalities in the summons, but also the want of a summons." Thirdly, if there was jurisdiction to take the examination, then *Reg. v. Scott* is conclusive. If there was not jurisdiction the examination and the answers thereto are in the light of a voluntary proceeding, and therefore admissible. In *Rex v. Sloggett* (7 Cox C. C. 139; Dearsley C. C. 656), where a bankrupt was examined before a commissioner, and had made no objection (the examination not being compulsory) to answering the questions put to him, it was held that it was a voluntary statement, and admissible against him upon a criminal charge.

Waddy, in reply.—In *Rex v. Sloggett* the question arose not upon defective process, but on whether the commissioner had jurisdiction.

Our. adv. vult.

Nov. 23.—KELLY, C.B.—We are all of opinion that the conviction should be affirmed. Two questions were argued at the bar. The first was a very important question in its consequences, and the second was one peculiar to the circumstances of this case. It was argued that the summons or order to attend the Court and be examined served on the defendant was irregular and void, on the ground that it was issued before the registration of the certificate of the appointment of the trustee, and because it was issued on the application of the trustee, who, though appointed by the creditors, was said to be not competent to act, the certificate of his appointment not having been registered, and therefore it was said that the summons was premature, irregular, and void, and did not make it compulsory on the defendant to obey it. On that

question I forbear to pronounce any opinion, and it becomes unnecessary to decide it, because I think that the defect, if any, was cured by the appearance of the defendant to the summons, and by his voluntary submission to answer the questions put to him. As to what was the effect of the summons, whether it was compulsory and obligatory, or not, sects. 96 and 97, upon which the question depends, seem to be provisions merely as to the process or mode of bringing the person before the Court for examination. Here the defendant having appeared thereto, it would be in violation of all rules of procedure, and opposed to common sense, not to say that he having answered voluntarily the questions, is not at liberty afterwards in a court of law to object that his answers are inadmissible against him.

MARTIN, B.—I am of the same opinion. On the 8th of June the defendant presented a petition to the Bankruptcy Court for the liquidation of his affairs by arrangement which petition contained this statement, "that the petitioner is unable to pay his debts, and is desirous of instituting proceedings for liquidation of his affairs by arrangement or composition, and hereby submits to the jurisdiction of this court in the matter of such proceedings." On the 28th June a meeting of his creditors was held, and a trustee was appointed. On the following day the trustee applied for a summons that the defendant should be examined on oath as to his trade dealings, and property. A summons was issued and served on the defendant, to attend to be examined on the 9th of July following. He had all the interval from the 28th of June to the 9th of July to consider the facts relating to his trade, dealings, and property. Then on the 9th July the defendant appears before the registrar in obedience to the summons, and was examined, and he made no protest then against anything that was done. The examination was adjourned to the 12th of July, when it was finished. He had then the opportunity of reading over what he had sworn, or what was sworn was then read over to him, and he signed his name to it twelve times. Yet, notwithstanding all this, it is said that his examination is not to be evidence against him, although he had the fullest opportunity of considering and correcting any error. The ground of the objection put forward is that he was compelled to criminate himself. If that ground is made out no doubt the examination ought to have been rejected. I cannot for my part, although it may turn out that the examination is evidence against him, see how it can be called a proceeding for the purpose of criminating himself. *Reg. v. Scott* has conclusively determined that the examination of a bankrupt under precisely similar circumstances is admissible in evidence against him, and I think that decision ought to be taken as conclusive because it seems to me that the only question is whether this was a lawful examination. There can be no doubt but that it was a lawful examination under the Act of Parliament, and I think, also, at common law. Mr. Waddy's objection was that under the 96th section, before the summons

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could issue, the certificate of the appointment of the trustee must have been registered. The contention was that the proceeding by liquidation was analogous to the adjudication of bankruptcy, and that the words "on the application of the trustee at any time after an order of adjudication has been made against a bankrupt," should be read as "on the application of the trustee at any time after the registration of the resolution of the creditors, that the affairs of the debtor shall be liquidated by arrangement, and appointing the trustee." That contention to my mind completely fails. By the petition on the 8th June he submitted himself to the jurisdiction of the court. Thereupon a summons issued for him to appear and be examined, and in obedience to that summons he did appear, and made no objection to being examined. Under these circumstances, whether the summons was irregular, or any summons at all, it is immaterial to inquire (although I think the summons was regular), the defendant cannot now object.

BYLES and MELLOR, JJ., concurred.

BRETT, J.—I am of the same opinion. It was said that the examination of the defendant was made under compulsion and illegally, because the summons was issued before the trustee was appointed, and that it was a condition precedent that the summons should be applied for after the appointment of the trustee, and that the trustee was not to be considered as appointed until his appointment was certified and registered. It is unnecessary to determine whether the trustee is to be taken as appointed at the time of his election, or at the date of the certificate of the appointment, and I desire to give no opinion upon that point. I will assume that he is not to be considered as appointed until the certificate is given. The summons to appear and be examined was issued before that day, but in point of fact, the defendant appeared and was examined after that day, and the examination was lawfully taken if the registrar had jurisdiction to examine him when he appeared. It seems to me that the registrar had power to examine him at that time. The provision in the section as to the application for the summons is merely directory and not a condition precedent, the court having jurisdiction to examine *aliunde*. Assuming the summons to have been irregular, that was an irregularity in procedure merely, and when the defendant appeared to the summons that irregularity was cured. Being before the court and being sworn, he was properly examined, and his examination was admissible against him. The case is within *Reg. v. Scott* and *Reg. v. Robinson*.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 18, 1873.

(Before COCKBURN, C. J., BOVILL, C. J., KELLY, C. B., MARTIN, B., BEAMWELL, B., KEATING, J., BLACKBURN, J., MELLORE, J., PIGOTT, B., LUSH, J., BRETT, J., CLEASBY, B., GROVE, J., DENMAN, J., and ARCHIBALD, J.)

REG. v. ELIZABETH BIRD.(a)

Larceny—Indictment—Description of money.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. 11d., and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her 1s., and refused to give her the 19s. change. Held that the prisoner could not be convicted upon this indictment of stealing 19s.

CASE reserved for the opinion of this Court at the General Court of Quarter Sessions for the county of Buckingham, holden at Aylesbury, in the said county, on the 15th of October, 1872.

Elizabeth Bird was tried upon an indictment, which charged that she, the said Elizabeth Bird, "on the 12th of October, 1872, 19s. in money, of the moneys of Maria Lovell, feloniously did steal, take, and carry away, against the peace of our Lady the Queen, her Crown, and dignity."

It was proved that the said Elizabeth Bird was the daughter of a man who travelled about to fairs with a "shooting gallery," and a "merry-go-round" or "revolving velocipede machine," for riding on which he made a charge of 1d. to each person for each ride.

On the day in question the said Maria Lovell got into the "merry-go-round," which was then in charge of the said Elizabeth Bird, and handed to the said Elizabeth Bird a sovereign in payment for the ride, asking her to give her the change. The said Elizabeth Bird, thereupon, handed to the said Maria Lovell 11d., and said that she would give her the rest of the change when

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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the ride was finished, as the "merry-go-round" was then about to start. The said Maria Lovell assented to this, and about ten minutes after, when the ride was over, she found the said Elizabeth Bird, who was then attending to the shooting gallery, and asked her for her change, to which the said Elizabeth Bird replied that she had only received from her 1s., for which she had given the proper change, and she declined to give any more.

Upon these facts it was contended by the counsel for the prisoner—first, that the prisoner could not be convicted of stealing the 19s., because no specific 19s. had ever been appropriated as the change for the sovereign handed to the prisoner, nor had there been a taking, either actual or constructive, of the 19s. from the said Maria Lovell; secondly, that under the above form of indictment, the prisoner could not be convicted of stealing the sovereign; and that even if the indictment was sufficient, there was no evidence of a felonious taking of the sovereign, as it was not taken from Maria Lovell against her will, and further, that the prisoner could not be convicted of larceny of the sovereign, as a bailee, because, assuming that there was any evidence of a bailment, which was denied, the bailment was not to re-deliver the same money which was delivered to the prisoner.

I overruled the objections, and directed the jury that if they were satisfied that the said Maria Lovell gave the prisoner the sovereign, and that she knew it, and wilfully refused to give the said Maria Lovell the remainder of the change, they might properly convict the prisoner of stealing the 19s.

The jury having returned a verdict of guilty, I reserved the above points for the consideration of the Court for the Consideration of Crown Cases Reserved, and judgment was in the mean time postponed and the prisoner admitted to bail.

The question for the opinion of the Court is whether, under the circumstances above stated, the prisoner was properly convicted on the above indictment.

Dated this eleventh day of November, 1872.

(Signed) BUCKINGHAM AND CHANDOS,
Chairman of the above Court of Quarter Sessions.

The case was first argued in the Court for the Consideration of Crown Cases Reserved, before Kelly, C.B., Martin, B., and Brett, Grove, and Quain, JJ., who directed it to be argued before all the Judges.

Graham for the prisoner.—The conviction can be supported. First, there was no larceny of the sovereign, because the prisoner was not bound to return it to the prosecutrix. To make the prisoner a fraudulent bailee she must have been bound to return the sovereign in specie: (*Reg. v. Hassell*, L. & C. 58; 8 Cox C. C. 491; *Reg. v. Garrett*, 2 Fos. & Fin. 14; *Reg. v. Hoare*, 1 Fos. & Fin. 647.) [BLACKBURN, J.—May the prisoner not have been a bailee of the sovereign subject to her right of lien on it

for 1s?] Not here, as the sovereign was handed to the prisoner with the intention that it should become her property, and credit was given to her for the change. [COCKBURN, C.J.—Was there any intention to part with the sovereign?] It is submitted that there was: (*Reg. v. Thomas*, 9 Car. & P. 741; *Rex v. Harvey*, 1 Leach C. C. 467; *Parke's case*, 2 East P. C. 671; *Reg. v. Oliver*, Bell C. C. 287; Cox C. C. 384; *Reg. v. Prince*, 11 Cox C. C. 145; L. Rep. C. C. R. 150; *Walsh's case*, Rus. & Ry. 215; *Reg. v. Reynolds*, 2 Cox C. C. 170; *Rex v. Nicholson*, 2 Leach C. C. 610.) If the prosecutrix intends to part with the property, the mere fact that the possession was obtained by a fraud does not make the offence larceny: (*Rex v. Jackson*, 1 Mood. C. C. 119; *Rex v. Atkinson*, 2 East P. C. cap. 16, sect. 104; *Reg. v. North*, 3 Cox C. C. 433; *Reg. v. Williams*, 7 Cox C. C. 355; *Reg. v. M'Kale*, 37 L. J. 97, M. C.; 11 Cox C. C. 32.) [COCKBURN, C.J.—Suppose the prosecutrix never intended to part with the property in the sovereign until she got the 19s. change? MELLOR, J.—Was there a voluntary parting with her entire interest in the sovereign? BLACKBURN, J.—The prosecutrix never thought of giving the prisoner credit for the 19s. KELLY, C.B.—The real question is was this but one transaction, a few minutes elapsing while the machine was going round is immaterial.] It is contended that the property in the sovereign was parted with, and that the prosecutrix could not have maintained an action to recover it, as she never intended to have that sovereign returned to her. Secondly, the conviction for stealing 19s., as alleged in this indictment, cannot be sustained. Before the 14 & 15 Vict. c. 100, s. 18, it was necessary to allege in the case of money stolen the specific coins, and it was customary to charge the stealing of so many pieces of the current coin of the realm called sovereigns, shillings, &c., as the case might be, and it was necessary to prove that some one of the specific coins alleged was stolen. To remove difficulties that had arisen on this state of the law, sect. 18 enacts that “in every indictment in which it shall be necessary to make any averment as to any money, &c., it shall be sufficient to describe such money, &c., simply as money, without allegation so far as regards the description of the property, specifying any particular coin, and such allegation so far as regards the description of the property, shall be sustained by proof of any amount of coin, although the particular species of coin, of which such amount was composed shall not be proved. Now, under the allegation of stealing 19s. in this indictment, the prisoner could not be convicted of stealing a sovereign. That was a variance. The prosecutrix was bound to prove that shillings had been stolen. Having particularised the money stolen, it should have been proved that shilling pieces were stolen. [GROVE, J.—The allegation is not nineteen pieces of the current coin called shillings, but 19s. in money. BLACKBURN, J.—That means, I should say, money to the value of 19s.] The word shilling must be taken as descriptive of the thing stolen, and

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REG. must be proved: (Archb. Crim. Pleadings, 190 (edit. 1862); *Reg. v. Deeley*, 1 Moo. C. C. 303; *Reg. v. Owen*, 1 Moo. C. C. 118; *Reg. v. Craven*, Rus. & Ry. 46; *Reg. v. West*, Dears. & B. 109; 7 Cox C. C. 183; *Reg. v. Bond*, 1 Den. C. C.; *Reg. v. Jones*, 1 Cox C. C. 105.)
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No counsel appeared for the prosecution.

The Judges retired to consider, and on their return into court,

COCKBURN, C.J., said: The majority of the Judges are of opinion that the prisoner was not properly convicted of stealing the 19s. charged in the indictment, for she had not taken them from the prosecutrix, and could not therefore be convicted on this indictment. The majority of the Judges do not say that she might not have been convicted on an indictment charging her with stealing the sovereign if the issue had been properly left to the jury.^(a) Upon the present indictment, however, she must be discharged.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

January 18, 1873.

(Before COCKBURN, C. J., BOVILL, C.J., KELLY, C.B., MARTIN, B., BRAMWELL, B., KEATING, J., BLACKBURN, J., MELLOR, J., PIGOTT, B., LUSH, J., BRETT, J., CLEASBY, B., GROVE, J., DENMAN, J., and ARCHIBALD, J.)

REG. v. MIDDLETON.^(b)

✓

Larceny—Parting with possession under mistake—Animus furandi.

A depositor in a post office savings bank obtained a warrant for the withdrawal of 10s., and presented it with his depositor's book to a clerk at the post-office, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed that sum upon the counter. The clerk entered 8l. 16s. 10d. as paid in the depositor's book, and stamped it. The depositor took up that sum and went

(a) In *Reg. v. Gumble*, ante, p. 248, a similar case to this, the court below amended the indictment, and substituted a sovereign for 19s. 6d., and the Court for the Consideration of Crown Cases Reserved, affirmed the conviction.

(b) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

away. The jury found that he had the *animus furandi* at the moment of taking money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up, and found him guilty of larceny:
Held, by a majority of the Judges, that he was properly convicted of larceny.

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CASE reserved for the opinion of this Court by the Deputy Recorder of the City of London.

At the session of the Central Criminal Court held on Monday, 23rd Sept. 1872, George Middleton was tried before me for feloniously stealing certain money to the amount of 8*l.* 16*s.* 10*d.*, the moneys of the Postmaster-General.

The ownership of the money was laid in other counts in the Queen and in the mistress of the local post-office.

It was proved by the evidence that the prisoner was a depositor in a post-office savings bank, in which a sum of 1*l.* stood to his credit.

In accordance with the practice of the bank he duly gave notice to withdraw 10*s.*, stating in such notice the number of his depositor's book, the name of the post-office, and the amount to be withdrawn.

A warrant for 10*s.* was duly issued to the prisoner, and a letter of advice was duly sent to the post-office at Notting-hill to pay the prisoner 10*s.* He presented himself at that post-office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10*s.*, referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed upon the counter a 5*l.* note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to 8*l.* 16*s.* 10*d.*

The clerk entered the amount paid, viz., 8*l.* 16*s.* 10*d.* in the prisoner's depositor's book, and stamped it, and the prisoner took up the money and went away.

The mistake was afterwards discovered, and the prisoner was brought back, and upon being asked for his depositor's book said he had burnt it.

Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up.

A verdict of guilty was recorded, and I reserved for the opinion of the Court for Crown Cases Reserved the question whether, under the circumstances above disclosed, the prisoner was properly found guilty of larceny.

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I discharged the prisoner on recognizance with sureties to appear and receive judgment when called upon.

(Signed) THOMAS CHAMBERS.

No counsel appeared for the prisoner.

The *Attorney-General* (*Metcalf* and *Slade* with him) for the prosecution.

It is submitted that the prisoner was properly found guilty of larceny. The facts bring the case within the definition of larceny by Bracton, bk. 3, c. 32, p. 150. "Furtum est secundum leges, contractatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit. Cum animo dico, quia sine animo furandi non committitur." Here the prisoner took the 8*l.* 16*s.* 10*d.*, which he at the time knew not to be his own, and to belong to the Postmaster-General, and without the consent of the Postmaster-General. It is not a satisfactory test of whether a fraudulent taking is larceny to see whether upon the facts an action of trespass would lie for the taking, as has been sometimes said it is. If a person finds a cheque in the street and takes it up, that is not a trespass, but if he applies it to his own use it is. The present case cannot be put higher than a finding, and if so, the prisoner was guilty of larceny. The case of *Merry v. Green* (7 M. & W. 623), shows that. That was an action of false imprisonment, and the defendant pleaded a justification on the ground that the plaintiff had committed a larceny. The facts were, that the plaintiff had purchased at a public auction a bureau, which contained a secret drawer, wherein was a purse and money, which he appropriated to his own use, and it was held that if the plaintiff had express notice that the bureau alone, and not its contents (if any) was sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use; but that if he had reasonable ground for believing that he bought the bureau with its contents (if any), he had a colourable right to the property, and it was no larceny. Parke, B., delivered the judgment, and in the course of it said: "It was contended that there was a delivery of the bureau and the money in it to the plaintiff as his own property, which gave him lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that though there was a delivery of the bureau, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendor to receive it, both were ignorant of its existence, and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this. It is said that the offence cannot be larceny unless the taking would be a tres-

pass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass. And it seems, also, from *Wynne's case* (Leach C. C. 413; 2 East P. C. 664), that if under the like circumstances he acquire possession and mean to act honestly, but afterwards alter his mind and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny." [BRAMWELL, B.—Suppose in this case the Postmaster-General had brought an action of trespass, and the defendant had pleaded not guilty and leave and licence, could he have made out a defence?] No. It is clear that if the prisoner had obtained the possession by any act or word amounting to misrepresentation, it would have been a case of larceny; but because he was silent, and took advantage of a mistake on the part of the clerk, is it to be said that it was not a larceny? [COCKBURN, C.J.—In *Rex v. Oliver*, cited in 4 Taun. 274, the prisoner offered to give the prosecutor gold for bank notes, upon which the prosecutor put down a number of bank notes for the purpose of their being so exchanged. The prisoner took up the notes and made away with them, and this was holden to be larceny, if the jury believed that the prisoner intended to run away with the notes and not to return with the gold.] In this case the jury found that the prisoner took the 8*l.* 16*s.* 10*d.* from the counter *animo furandi*. [BRETT, J.—Was the taking here against the will of the owner? The clerk had a general authority to pay the warrant.] There is nothing to show that he had any authority to part with the 8*l.* 16*s.* 10*d.*, except to the person to whom it belonged. His duty was to pay in accordance with the letter of advice in each case. In *Reg. v. Prince* (L. Rep. 1 C. C. R. 150; 11 Cox C. C. 193), where it was held that money knowingly obtained on a forged cheque from a cashier at a bank is not larceny, Blackburn, J., said, "As the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority coequal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intended to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession the offence so committed will be larceny." [BRETT, J.—What difference is there between a clerk at the post office and a clerk in the Bank? COCKBURN, C.J.—This was the mistake of a person who stood *in loco* of the owner.] In *Reg. v. Longstreeth* (1 Moo. C. C. 137), it was held that obtaining *animo furandi* a parcel from a carrier's servant by falsely pretending to be the person to whom it was directed is larceny.

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The following cases were also referred to: *Reg. v. Campbell* (1 Moo. C. C. 179), *Olough v. London and North-Western Railway Company* (41 L. J. 17, Ex.), *Reg. v. West* (Dears, 402, 6 Cox C. C. 415), *Reg. v. Glyde* (11 Cox C. C. 103, 37 L. J. 107, M. C.)

Cur. adv. vult.

Jan. 25.—KELLY, C. B. said the majority of the judges were of opinion that the conviction should be affirmed. The reason for the judgment will be delivered at a future day.(a)

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 25, 1873.

(Before KELLY, C.B., MELLOR, J., PIGOTT, B., DENMAN, J., and POLLOCK, B.)

REG. v. JOHN JOHNSON.(b)

Perjury—Deputy coroner—Jurisdiction—Inquisition—6 & 7 Vict. c. 83.

On the trial of an indictment for perjury committed at an inquest before the deputy coroner, evidence was given by the prosecution that the coroner, who was also a County Court registrar, was absent on his vacation, a vacation and air and exercise having been recommended by medical advisers for his health, which had become permanently impaired. It also appeared that the coroner, during his absence, spent three or four days every week in shooting, and that by far the greater number of inquests held in the district were held by the deputy coroner.

Held, that it was a question for the judge, and not for the jury, whether the coroner was absent at the time for a lawful or reasonable cause, within 6 & 7 Vict. c. 83, s. 1.

Held, also, that the inquisition was valid, and that the deputy coroner was lawfully acting at the time (sect. 2 of same statute.)

CASE reserved for the opinion of this Court by Denman, J., at the last Winter Assizes for the county of Durham.

(a) Although the reasons have not yet been given it is thought useful to publish the decision now on account of its practical nature.

(b) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

John Johnson was tried and found guilty of perjury, subject to the opinion of this Court upon the following case :

The perjury alleged was committed by false oaths taken before Thomas Dean, who held an inquest, as deputy coroner, touching the death of one Owen O'Hanlon.

Thomas Dean was called and produced an appointment, dated 1866, of himself as deputy coroner for Darlington Ward. This appointment was duly signed and sealed by William Dale Trotter, the then present coroner for the said ward, and properly countersigned as required by law.

The inquest was opened on the 11th of October, 1872, and continued by adjournment from time to time on several days up to and after the 7th of November, the day of the perjury in question.

The said Thomas Dean, upon cross-examination, and the said coroner, who was also examined, proved that since 1866 by far the largest number of all the inquests held in Darlington Ward had been held by the said Thomas Dean, as deputy coroner. That on the 11th of October, when the inquest in question commenced, the said coroner, who was also an attorney in practice, and registrar of the County Court, and held other offices, was absent from his home and usual place of business as an attorney, having left home on the 24th of September previous, in order to take a vacation until the 14th of October, such absence and vacation, and air and exercise, having been recommended to him by medical advisers as necessary for his health, which had become permanently impaired from an operation which he had undergone some eighteen months previously. That between the last-mentioned dates he spent three or four days every week in shooting. That owing to his engagements as registrar of the County Court the above period was the only time of the year during which he could obtain any vacation, that being the period appointed for the vacation of registrars of County Courts. Mr. Trotter also stated that when the inquest in question began he was not in such a state of health as to be able properly to discharge the duty of holding an inquest of the kind and duration of which that in question appeared likely to be.

Upon these facts it was contended, on behalf of the prisoner, that the proceeding before the said Thomas Dean was *coram non judice*, because it was incumbent on the prosecution, in order to show jurisdiction in a deputy coroner, to administer an oath to prove affirmatively that there was lawful or reasonable cause for the absence of the coroner (citing 6 & 7 Vict. c. 83, s. 1, proviso 2), and that the facts here did not amount to any evidence of such cause. He also contended that the question was one for the jury and not for me.

The counsel for the Crown contended, that even if the facts proved were insufficient to show that there was lawful or reasonable cause, still, inasmuch as by sect. 2 of the same Act, it is provided that inquisitions are not to be quashed by reason of

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their having been taken by a deputy, the oath, on which the perjury was assigned, being an oath on which a good inquisition might have been founded, could not be said to be *coram non judice*, but was one legally administered in a judicial proceeding, and therefore one on which perjury could be legally assigned.

I held, that, even assuming it to be for the prosecution to make out affirmatively in such a case, that there was lawful or reasonable cause for the absence of the coroner (which point, however, I reserved for this Court) there was in this case such lawful or reasonable cause, but I reserved for this Court the question whether there was evidence upon which I could properly so hold.

The first question of law reserved for the opinion of this Court is whether it was incumbent upon the prosecution to make out that there was lawful or reasonable cause for the absence of the coroner from the inquest in question. If it was not, the conviction to stand. If it was, then the second question reserved is whether it was for me or for the jury to decide whether there was such lawful or reasonable cause. If for the jury, the conviction to be quashed unless the first question be decided in the negative. If for me, then the third question reserved is whether there was evidence upon which I might properly decide as I did. If so, the conviction to stand. If not, to be quashed unless the first question be decided in the negative.

I sentenced the prisoner to eighteen months imprisonment, and refused to admit him to bail.

The 6 & 7 Vict. c. 83, s. 1, enables a coroner to nominate and appoint from time to time a fit and proper person (such appointment being subject to the approval of the Lord Chancellor) to act for him as his deputy in the holding of inquests. Provided that a duplicate of such appointment shall be transmitted to the clerk of the peace. Provided also that no deputy shall act "except during the illness of the said coroner, or during his absence from any lawful or reasonable excuse."

Sect. 2 recites that it is expedient to make provisions for supporting coroners' inquisitions and for preventing the same from being quashed on account of technical defects, and enacts that no inquisition found upon or by any coroner's inquest shall be quashed, stayed, or reversed (*inter alia*) nor (except only in cases of murder or manslaughter) "by reason of any such inquisition not being duly sealed or written upon parchment, nor by reason of any such inquisition having been taken before any deputy instead of the coroner himself."

T. C. Foster for the prisoner.—The conviction cannot be upheld, for the inquisition was taken *coram non judice*. Before the 6 & 7 Vict. c. 83, there was no power to appoint a deputy coroner in a county. No doubt it must be assumed that the deputy coroner was appointed and his appointment approved by the Lord Chancellor, but it was not proved at the trial that a duplicate of his appointment had been transmitted to the clerk of the peace.

[DENMAN, J.—No such point was raised on the trial or reserved for this Court.] Then, it was not proved that the coroner was so ill as to be unable to attend, or that his absence was lawful and reasonable. On the contrary, it appeared that he was absent on his vacation, and was able to go out shooting. [MELLOR, J.—Is the degree of illness material? He was recommended by medical advisers to take air and exercise as necessary for his health. DENMAN, J.—The words of the proviso in sect. 1 are “lawful or reasonable absence.” At the trial the prosecution did not rely on the illness of the coroner. Was not his absence lawful under the circumstances?] The case finds that by far the greater number of inquests were held by the deputy coroner. [KELLY, C.B.—That does not affect this particular inquest. He referred to *Reg. v. Perkin* (7 Q. B. 165).] It was a question for the jury whether the coroner’s absence was reasonable or not. [MELLOR, J.—It would be very singular if it was a question for the jury whether the cause of absence was a lawful one.] The learned counsel then cited Taylor on Evid. s. 30. Next, as to the effect of the second section of the Act. That enactment was passed to cure inquisitions from formal defects. This was an objection to the authority of the judge himself, before whom the inquisition was taken.

Giffard, Q.C. (*R. Luck* with him) for the prosecution was not called upon to argue.

KELLY, C.B.—I am of opinion that the conviction must be affirmed. As to the first question, I have no doubt that it was the province of the judge to determine what was a lawful or reasonable cause for the absence of the coroner, and that the judge would have done wrong if he had left that question to be determined by the jury. But independently of that, the case is concluded by sect. 2 of the Act. The same question arises now as would have arisen if there had been a proceeding in the Court of Queen’s Bench to quash this inquisition. If the inquisition is upheld it follows that the inquest must be taken to have been duly held, and that false evidence given upon it was punishable as perjury. Sect. 2 recites that it is expedient to make provision for supporting coroner’s inquisitions, and then enacts that no inquisition shall be quashed, stayed, or reversed by reason of a number of things specified, and then proceeds, “nor except in cases of murder or manslaughter by reason of any inquisition having been taken before any deputy instead of the coroner himself.” This was a case of perjury and not of murder or manslaughter, and I am of opinion that the inquisition was a valid one within this enactment.

MELLOR, J.—I am of the same opinion. I consider that *prima facie* the inquisition must be held to have been lawfully holden before the deputy coroner. But it was said that upon the evidence given it was a question for the jury, and not for the judge, whether there was a lawful or reasonable cause for the absence of the coroner. I think that where the question arises incidentally

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at the trial like the admissibility of secondary evidence, where it is necessary to show that searches and all reasonable efforts have been made to find the missing document, it is a question to be determined by the judge. At the trial the jurisdiction of the deputy coroner before whom the perjury was committed was disputed on the ground that there was no lawful or reasonable cause for the absence of the coroner. That question was an incidental matter arising at the trial which it was for the judge to decide. But, further, this inquisition is protected by sect. 2 of the statute.

PIGOTT, B.—I rest my judgment on the second ground that the inquisition is protected by sect. 2, which must be taken to uphold everything which led to the inquisition. I do not, however, differ from the other members of the Court on the first point.

DENMAN, J.—It is not necessary to hold that in cases of inquests held by a deputy coroner he must be presumed *prima facie* to be acting legally, and assuming it to be competent to the prisoner's counsel to contend successfully if he can establish it, that if the deputy coroner is not acting in the absence of the coroner from lawful or reasonable cause, there must be an acquittal, I will consider this case. The prosecution took upon itself at the trial to make out that the deputy coroner was duly appointed. The deputy coroner was cross-examined, and the facts stated in the case elicited. It was then said that no evidence of the perjury could be given as the deputy coroner was not properly acting, and no lawful or reasonable cause was shown for the absence of the coroner himself, and that whether the absence was lawful or reasonable was a question for the jury, and not for the judge. I held that it was a question for the judge, and that there was upon the evidence a lawful or reasonable cause for the absence of the coroner on this inquest. When the statute says that when a deputy coroner shall be acting owing to the lawful absence of the coroner, it seems clear that the question, what is a lawful cause of absence is a question for the judge. But, however, that may be, sect. 2 gives the go-by to that question. That section assumes that there might be some objection to the acting of the deputy coroner, but says that the inquisition shall nevertheless be valid. It follows that the holding of the inquest was a judicial act, and that the false evidence was given in the course of a judicial proceeding.

POLLOCK, B., concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

January 25, 1873.

(Before KELLY, C.B., MELIOR, J., PIGOTT, B., DENMAN, J., and
POLLOCK, B.)

REG. v. SLOWLY AND HUMPHREY. (a)

Larceny—Goods obtained by trick—Credit.

Prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning.

Held, that the conviction was right.

CASE reserved for the opinion of this Court by Mr. Justice Byles.

The prisoners, at the last Winter Assizes for the county of Sussex, at Lewes, were jointly indicted for stealing onions.

The prosecutor, having a cart loaded with onions, met the prisoners, who agreed to buy all the onions at a certain price, viz., 3*l.* 16*s.* for ready money, the prisoners saying, "You shall have your money directly the onions are unloaded."

The onions were accordingly unloaded by the prosecutor and the prisoners together, at a place indicated by the prisoners.

The prosecutor then asked for his money. The prisoners thereupon asked for a bill, and the prosecutor made out a bill accordingly. One of the prisoners said they must have a receipt from the prosecutor, and in the presence of the other made a cross upon the bill, put a 1*d.* postage stamp on it, and then said they had a receipt, and refused to restore the onions or pay the price.

The next morning the prisoners offered the onions for sale at Hastings.

The jury convicted both the prisoners of larceny, and said they found that the prisoners never intended to pay for the onions, and that the fraud was meditated by both the prisoners from the beginning. The prisoners' counsel insisting that under these circumstances there was no larceny, I reserved the point for the decision of the Court of Criminal Appeal.

(Signed) J. BARNARD BYLES.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Willoughby, for the prisoners.—The prisoners were not properly convicted of larceny, for the prosecutor gave credit to the prisoners for the 3*l.* 16*s.*, and delivered the onions to them on such credit. [KELLY, C.B.—What credit was given? The case is like *Reg. v. McGrath* (39 L. J. 7, M. C.; Cox C. C. 347)]. This is a different case. There the money was obtained against the will of the owner. Here the onions were unloaded by the prosecutor. Moreover, it was proved, though not stated in the case, that the prosecutor called on the prisoners in the evening for the money.

The learned counsel then cited 2 East. P. C. 669 (edit. A.D. 1805), and the cases of *Rex v. Harvey* and *Reg. v. Nicholson*, there cited. Also *Rex v. Oliver* (2 Leach, 1072), *R. v. Adams* (2 Rus. on Crimes, 209), *Tooke v. Hollingsworth* (5 T. R. 231, Buller, J.), *Reg. v. Small* (8 C. & P. 46), *Reg. v. Stewart* (1 Cox C. C. 174), *Reg. v. McKale* (37 L. J. 97, M. C.; 11 Cox C. C. 32).

Pocock, for the prosecution, was not called upon to argue.

KELLY, C.B.—I am of opinion that the conviction should be affirmed. If in this case it had been intended by the prosecutor to give credit for the price of the onions, even for a single hour, it would not have been larceny, but it is clear that no credit was given or ever intended to be given. Any idea of that is negatived by the statement in the case that the prisoners agreed to buy for ready money. In all such sales the delivery of the thing sold, or of the money, the price of the thing sold, must take place before the other, *i.e.*, the seller delivers the thing with one hand while he receives the money with the other. No matter which takes place first, the transaction is not complete until both have taken place. If the seller delivers first before the money is paid, and the buyer fraudulently runs off with the article, or if, on the other hand, the buyer pays first, and the seller fraudulently runs off with the money without delivering the thing sold, it is equally larceny.

MELLOR, J.—I am of the same opinion. The prisoners obtained possession of the onions by a trick, and never intended to pay for them, as the jury found. From the very first they meditated the fraud to get possession of them, which puts an end to any question of its being larceny or not.

PIGOTT, B.—The facts are, that the prosecutor never intended to part with the possession of the onions except for ready money. He did part with the possession to the prisoners, who obtained the possession by fraud. The prisoners then brought in aid force to keep possession, and refused to restore the onions or pay the price. Therefore, the possession was obtained against the will of the prosecutor.

DENMAN, J., and POLLOCK, B., concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

(Before KELLY, C.B., WILLES, J., CLEASBY, B., GROVE and QUAIN, JJ.)

April 27, 1872.

REG. v. WATKINSON.(a)

Pleading—Indictment—Debtors Act—Arrest of judgment—32 & 33 Vict. c. 62, s. 19.

Quære—whether the Court for the Consideration of Crown Cases Reserved can entertain a question as to quashing an indictment, reserved at the trial.

The Debtors Act (32 & 33 Vict. c. 62), s. 19, enacts: That in indictments for offences under that Act it shall be sufficient to set forth the substance of the offence charged in the words of the Act, specifying the offence, "without setting out any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act, 1860."

Held, that an indictment for misdemeanour framed upon sect. 11, sub-sect. 13, of the Act, which enacts, "that if within four months next before the presentation of a bankruptcy petition, the trader by any false representation, or other fraud, has obtained any property on credit and has not paid for the same," which merely charged "that a bankruptcy petition was presented against the defendant to the County Court, &c., upon which the defendant was adjudged bankrupt, and that the defendant within four months before the presentation of the said petition did by certain false representations obtain from B. on credit, certain property, and has not paid for the same," was sufficient in arrest of judgment under the above statute, and also under Peel's Act (7 Geo. 4, c. 64), s. 20.

CASE reserved for the opinion of this Court by Mr. Justice Quain.

Thomas Watkinson was convicted of a misdemeanour at the Spring Assizes for the West Riding of the county of York, holden at Leeds on the 21st of March, 1872. Sentence was postponed and the defendant was admitted to bail, in order that

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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the opinion of the Court for Crown Cases Reserved should be taken on the following case:—

The prisoner was indicted under the Debtors Act, 1869, sect. 11, sub-sect. 13, for that he within four months next before the presentation of a bankruptcy petition against him by certain false representations did obtain property on credit and did not pay for the same.

He was also indicted in other counts of the same indictment, under the same Act, sect. 13, sub-sect. 1, for that he did in incurring certain debts and liabilities obtain credit by false pretences.

The following is a copy of two of the counts of the indictment:

The other counts are similar, differing only in the names of the persons from whom the credit or property was obtained.

West Riding of Yorkshire, to wit,—The jurors for our Lady the Queen, upon their oath present that on the 14th of April, 1871, a bankruptcy petition was presented against Thomas Watkinson, to the County Court of Yorkshire, holden at Bradford, and that upon such petition the said Thomas Watkinson was duly adjudged bankrupt by the Court aforesaid, upon the 15th of April in the year aforesaid, and that the said Thomas Watkinson within four months next before the presentation of the said bankruptcy petition against him, to wit, on the 20th of February, 1871, did by certain false representations, obtain from one John Bryant on credit certain property, to wit, certain goods to the amount of 70*l.*, and that the said Thomas Watkinson has not paid for the same property, against the form of the statute in such case made and provided, and against the peace, &c.

And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Watkinson, on the 20th of February 1871, did in incurring certain debts and liabilities to the said John Bryant obtain credit from the said John Bryant under false pretences, against the form of the statute in such case made and provided, and against the peace, &c.

The counsel for the prisoner moved to quash the indictment on the ground that it was too vague and general. That it would enable the prosecution to prove under it any number of false representations and false pretences. That the counts should have been confined to one false representation or one false pretence. And that the false representations and false pretences, or some of them, ought to have been set out in the indictment, otherwise there would be a difficulty of pleading *autrefois convict* or *acquit* to such an indictment.

The counsel for the prosecution relied on the Debtors Act, 1869, s. 19, as justifying the form of the indictment. The learned judge reserved for the opinion of this Court the question whether the above indictment ought to have been quashed.

Some discussion took place during the argument as to whether this court could entertain the question as left to them, but as Mr. Justice Quain reported that the real point raised was as to whether

the indictment was good, the Court said the objection would be considered as taken in arrest of judgment.

T. Campbell Foster, for the prisoner.—The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 11, sub-sect. 13, enacts “that if within four months next before the presentation of a bankruptcy petition against any person, or the commencement of the liquidation, he by any false representation or other fraud has obtained any property on credit, and has not paid for the same, such person shall be deemed guilty of a misdemeanor.” Sect. 19 provides that in an indictment for an offence under that Act it shall be sufficient to set forth the substance of the offence charged in the words of the Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in, or order, warrant, or document of any court acting under the Bankruptcy Act, 1869.” Under this section it is not sufficient to allege, in such a general way as is done in this indictment, that the prisoner did “by certain false representations obtain property on credit and has not paid for the same.” That is stating the character but not the substance of the offence. The case is similar to that of an indictment for perjury, in which by the 14 & 15 Vict. c. 100, s. 20, it is enacted that it shall be sufficient to set forth the substance of the offence charged. In that case it would be insufficient to allege merely “that the defendant committed perjury. In *Rex v. Perrott* (2 M. & S. 385), Lord Ellenborough said, “Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. The Legislature have so held, and have recorded their opinion to that effect in the case of perjury in stat. 23 Geo. 2, c. 11 (by which they relieved the party prosecuting from many of the forms theretofore incumbering the prosecution of that charge), when they enacted that it should be sufficient to set forth the substance of the offence charged, together with the proper averments to falsify the matter wherein the perjury is assigned. The Legislature, when they so enacted, must have contemplated a form of prosecution in which the word falsely as a prefatory allegation was generally if not always used; and we must consider them as thinking that not a sufficient allegation to falsify the matter without the proper averments.” To allege merely that the defendant did, by certain false representations, obtain credit is simply stating the offence by its name. In *Rex v. Mason* (2 T. R. 581) it was holden to be error merely to allege that money was obtained by “false pretences,” without specifying them. In *Davy v. Baker* (4 Burr. 2471) a declaration for a bribery penalty was held bad in arrest of judgment, which merely alleged that the defendant “did receive a gift or reward” in the words of the Act 2 Geo. 2, c. 24. In *Reg. v. Bell* (12 Cox C. C. 37) a count under the Debtors Act, 1869, s. 13, sub-sect. 1, alleging simply that the defendant did obtain credit from the prosecutor “by means of fraud other than by false pretences,” without setting out the means, was

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quashed, as being too general. The cases of *Reg. v. Martin* (8 A. & E. 481), *Rex v. Plestow* (4 Camp. 494), were then cited. *Waddy* (*Wilberforce* with him) was not called upon to argue.

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KELLY, C.B.—It might be doubtful whether this Court has power to quash an indictment, and I give no opinion on that point, but upon the report of the learned judge we may treat the point as arising upon a motion in arrest of judgment. If it were necessary to rely upon authority, we have only to look to the cases of *Reg. v. Blake* (6 Q. B. 126), and *Reg. v. Mulready*, which are fatal to the objection taken upon this indictment in arrest of judgment. It may be that at common law, and but for sect. 19 of the Debtors' Act, an objection might have been made effectually to the indictment; but the answer to the objection is clear upon sect. 19. The question is whether it is sufficient to sustain the indictment that the offence should be set forth in the words of the Act. What the Legislature really meant to enact was that it should be unnecessary to set out the proceedings in bankruptcy. It is quite sufficient in stating the offence to adopt the words of the Act. Then again, Peel's Act (7 Geo. 4, c. 64), s. 20, is also conclusive against the objection taken in arrest of judgment, as the offence is described in the words of the Act. The objection, therefore, fails.

The rest of the Court concurring,

Conviction affirmed.

VICE-CHANCELLOR BACON'S COURT.

January 27, 1873.

MANNING v. GILL.

Criminal lunatic—Settlement to avoid forfeiture inoperative.

A person under a charge of felony previous to his trial conveyed all his real estate to his brother, reserving a life interest only, and assigned to his brother all his personal estate absolutely. He was acquitted of the charge on the ground of insanity:

Held, that the settlements were inoperative on the ground of the lunacy of the settlor, because they were executed under a misapprehension, and because the event which they were framed to meet had not happened.

THIS was an application that a sum of money standing to the credit of the cause might be transferred to the petitioners under the following circumstances.

In 1857 Andrew Gill stabbed a man so that his life was for some time in danger, but he afterwards recovered; for this offence he was tried at the Taunton Spring Assizes of 1857, and found not guilty on the ground of insanity, and was ordered to be imprisoned during Her Majesty's pleasure.

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At the time of committing this offence Andrew Gill was entitled to certain real and personal estate under the will of his father.

On the 30th of March, 1857, Andrew Gill executed shortly before his trial two deeds; by the one he conveyed all his real estate to his brother Robert Gill in trust for himself (Andrew) for life, with remainder to his said brother Robert in fee, and by the other he assigned all his personal estate to his said brother Robert absolutely.

Part of the income arising from the real estate had been paid to Andrew Gill to provide him with comforts while in the Criminal Lunatic Asylum at Broadmoor, but the residue thereof, together with the income arising from the personal estate, had been accumulated.

Robert Gill, who died in March, 1867, by his will devised and bequeathed all his real and personal estate to trustees in trust to be divided as therein mentioned among his three children.

In May, 1869, a suit was instituted for the administration of Robert Gill's real and personal estate, and by an order made in July, 1871, it was ordered that the amount of the personal estate, together with the accumulations of interest and income from the real estate which the testator, Robert Gill, held under the assignment from his brother, Andrew Gill, be paid into Court.

The petitioners, who were the persons interested under the will of Robert Gill, now applied that the fund in Court might be transferred to them, alleging that they were absolutely entitled thereto under the deeds of the 30th of March, 1857, and the will of Robert Gill.

From the evidence it appeared that Andrew Gill (who was still confined as a lunatic) was a person of naturally weak intellect, but sane except when excited by anger or drink, on which occasions he would lose all control over himself, and would not be accountable for his actions. The solicitor's clerk who prepared the deeds stated that having explained to Andrew Gill that the effect of his conviction would be that his property would be forfeited to the Crown, he authorised him to prepare the deeds, and that before executing them he read them over and explained them to him, and that at the time of executing them, Andrew Gill was of sound mind, and fully knew and understood their contents and effect, and freely executed the same.

Kay, Q. C., and *Freeling* were for the petitioners.

Smart, for Andrew Gill's guardian.—The settlor was not of sufficiently sound mind to make this settlement, nor was the effect of it explained to him: (*Phillipson v. Kerry*, 9 L. T. Rep. N. S. 40; 11 W. Rep. 1034.) It was also made under the mis-

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apprehension that in case of conviction a forfeiture of his property would thereby be avoided (*Birch v. Blagrove*, Amb. 264; *Davies v. Otty*, 12 L. T. Rep. N. S. 789; 34 L. J. 252, Ch.), whereas it would have been void as against the Crown: (*Saunders v. Wharton*, 11 W. Rep. 276.)

W. W. Karlake, F. Webb, and Badcock appeared for other parties interested.

Kay, Q.C., in reply. Although this settlement might have been fraudulent as against the Crown, it is binding on the parties themselves: (*Shaw v. Jeffery*, 13 Moo. P. C. C. 432, 454; *Phillpotts v. Phillpotts*, 10 C. B. 85.) The settlement is neither void nor voidable.

The VICE-CHANCELLOR said: It is clear, upon the evidence, that Andrew Gill, from the age of ten years, was always a person of weak intellect, and incapable of managing himself or his affairs. In 1857 he was tried for stabbing a man, and was acquitted on the ground of insanity. Previously to his trial he executed a voluntary settlement of all his property, the only motive in his mind being to prevent a forfeiture in case he was convicted. Robert Gill, in whose favour the settlement was made, never touched any of the money, as he was aware that he was merely a trustee of the property for his brother. I cannot order payment of this money under such a title as that of the petitioners. The deed under which they claim was purely voluntary and executed under a total misapprehension of the law, and, moreover, the event which it was framed to meet, viz., his conviction, never happened. The deed is inoperative, and the petition must be refused.

Solicitors: *William Moon; William Smith and Co.*

COURT OF QUEEN'S BENCH.

January 27 and 29, 1873.

REG. v. THE LORDS OF THE TREASURY; *Ex parte* THE JUSTICES OF LANCASHIRE.

Mandamus—Costs of prosecutions—Statutory obligation of Lords of the Treasury.

By 7 Geo. 4, c. 64, ss. 22 & 23, an order for the payment of costs of prosecutions may be made by the courts before which they are tried. By sect. 24 the order for payment is to be made by the officer of the court upon the Treasurer of the county, who is thereby authorised and required, upon sight of every such order, forthwith to pay the money in such order mentioned and shall be allowed the same in his accounts. By sect. 26 the justices at quarter sessions were to make regulations as to costs.

By 14 & 15 Vict. c. 55, ss. 4 and 5, the power of quarter sessions to regulate costs of prosecutions was transferred to the Secretary of State.

By the Annual Appropriation Acts since 1835 there has been a grant of a gross sum each year for charges formerly paid out of county rates.

By 29 & 30 Vict. c. 39, s. 14, when any sum shall have been granted to Her Majesty by an Act of Parliament to defray expenses for any specific public services, it shall be lawful for her Majesty, from time to time, by her royal order, under the royal sign manual, countersigned by the Treasury, to authorise and require the Treasury to issue, out of the credits to be granted to to them on the Exchequer accounts, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted.

The accounts of costs of prosecutions in the county of Lancaster, after having been duly taxed by the proper officers, and paid out of the county rates, were re-taxed by officers of the Treasury, and part of them were disallowed. The justices of the county obtained a rule nisi for a mandamus to compel the Lords of the Treasury to pay the disallowed balance to their treasurer.

Held, that the Lords of the Treasury had no right to tax these costs after they had been allowed by the proper officers; but that this court had no jurisdiction to issue a mandamus to compel the Lords of the Treasury to pay the balance.

MANISTY, Q.C., had obtained a rule nisi, calling upon the Lords Commissioners of Her Majesty's Treasury to show cause why a writ of *mandamus* should not issue directed to them,

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commanding them to issue a Treasury minute on authority to the paymaster of civil contingencies, or other proper officer, directing and authorising him to pay, or cause to be paid, to Henry Alison, the treasurer of the county palatine of Lancaster, the sums specified and claimed in affidavits upon which the rule was moved.

It appeared from the affidavits of the deputy clerks of the peace, and the treasurer of the said county, that during the half year ending the 31st of December, 1870, the costs of all prosecutions in the said county were, upon the charges made by the respective prosecutors in their bills of costs, duly taxed by the proper officers in the county, and under the direction of the courts before which the respective cases were tried. Orders of court in the usual form for the payment of sums expended for these prosecutions at assizes and quarter sessions, including adjudications under the Criminal Justices and the Juvenile Offenders Acts, were duly presented to the county treasurer, who paid the amounts directed by the said orders out of the rates of the said county. The accounts of these payments, amounting to 6747*l.* 11*s.* 9*d.*, with all receipts, documents, certificates, and vouchers, relating thereto, were transmitted to the Lords of the Treasury on the 26th of January, 1871. On the 7th of September, 1871, the sum of 6646*l.* 19*s.* 3*d.* was paid to the county treasurer by the Lords of the Treasury; the balance between these two amounts was taxed off, and disallowed by the Board of Examiners of Criminal Law Accounts; and although applications were made by the clerks of the peace, both by letter and in person, the Lords of the Treasury refused to pay this balance, or any part of it, to the County Treasurer. It was stated upon affidavit that it was believed the amount granted by the Appropriation Act, 1870, to defray the charges for prosecutions formerly paid out of the county rates, and for other like charges, had not been entirely expended, but the Lords of the Treasury had in their hands a sufficient amount of the said sum to defray the balance claimed on behalf of the county of Lancaster.

The amounts taxed off by the examiners consisted of charges for certificates of previous convictions in cases of acquittal or confession of guilt; of counsel's fee for settling indictment in a perjury case, ordered by Cleasby, B.; of counsel's fee for consultation; of the costs of second indictments not mentioned in the calendars; of the costs of trials of prisoners whose names did not appear in the calendars; and of travelling and other expenses of witnesses, disallowed for various reasons.

The *Solicitor-General* (Jessel, Q. C.), *Brown*, Q. C., and *Archibald*, on behalf of the Lords of the Treasury, showed cause.—This is a case in which a *mandamus* will not lie. Where the Legislature has constituted the Lords of the Treasury as individuals, to be mere trustees for persons entitled to money specifically granted, the Lords of the Treasury are subject to the jurisdiction of the courts, but in no case can a court of justice interfere with ministers of the Crown acting in that capacity. If

a *mandamus* could apply to a matter of this kind, the management of the public funds would be transferred from the ministers of the Crown to this Court. First, therefore, this grant is made to the Lords of the Treasury, as servants of the Crown, and they are not subject to a court of law concerning it; secondly, even if a *mandamus* to the Lords of the Treasury were within this Court's jurisdiction, there is no statutory obligation upon them to pay the sums here claimed. The rule asks to compel the issue of a Treasury minute, *i.e.*, to interfere with the executive management of the Treasury Office. [COCKBURN, C. J.—The minute is only the means for obtaining payment; if there is a duty to pay, it is proper to ask for the performance of a preliminary step.] But there is no duty to pay; the statutory provision relied upon is that contained in schedule B. of the Appropriation Act, 1871 (34 & 35 Vict. c. 89.) “Part 7. Civil Services. Class iii. Schedule of sums granted to defray the charges of the several Civil Services herein particularly mentioned, which will come in course of payment during the year ending on the 31st of March, 1872, *viz.* :” “No. 2. For prosecution at assizes and quarter sessions in England, formerly paid out of county rates, including adjudications under the Criminal Justice and the Juvenile Offenders Acts, sheriff's expenses, salaries to clerks of assize and other officers, and for compensation to clerks of the peace under the Criminal Justice Acts, and other expenses of the same class, 201,173*l.* This Act is passed annually with the object of restraining the servants of the Crown from expending the sums voted upon other objects than those specified, but does not impose any duty to pay the whole of the amounts. Indeed, the amounts are only estimates for the future, and as appears from the preamble to the Act the total is granted to Her Majesty towards making good the supply. The title is “An Act to apply a sum out of the consolidated fund to the service of the year ending 31st of March, 1872, and to appropriate the supplies granted in this session of Parliament.” To appropriate does not mean to set aside the whole sum specified for particular payments, but to limit its expenditure, or so much of it as is necessary, to those payments only. [COCKBURN, C. J.—When the expenditure is duly incurred for the purpose specified, surely the Appropriation Act was intended to provide that the expenditure should be defrayed out of this sum.] All that the Act says is—the Crown shall not employ this sum for another purpose. It is not by this Act, but by resolution of the House of Commons, that this money gets to the hands of the Lords of the Treasury: (Exchequer and Audit Departments Act, 1866 (29 & 30 Vict. c. 39) s. 14.) Thirdly, assuming the Treasury to be subject to the jurisdiction, and the words of the Act to create an obligation to pay the whole sum granted to the objects mentioned, there must be a discretion inherent to the grant of a sum in gross, belonging to the Ministers of the Crown, who have the disposal of it. *Mandamus* will not lie against a person upon a matter concerning which he

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may exercise a discretion. [BLACKBURN, J.—Not so: Where a discretion is given by statute we can compel its exercise. Here, as the Treasury, by making no answer to the affidavits, refuse to enter upon the merits of the claim, we must assume that they have plenty of money to discharge all claims which are made upon them.] The Board of Examiners of Criminal Law Accounts was created by the Treasury in the year 1857, and a salary has been annually granted to the members, by resolution of the House of Commons. For fifteen years, therefore, the practice of taxing these costs has obtained, and the estimates have been made upon the results of the practice; if the amounts claimed by the counties were paid in full, the grant in the Appropriation Act would not be sufficient. The first reported case of a *mandamus* against the Lords of the Treasury was in the year 1855, in the matter of Wm. Carmichael Smyth (4 A. & E. 286.) There the rule for a *mandamus* was made absolute, but it was so made expressly upon the ground that the Lords of the Treasury had admitted that the money for paying the amount asked for was in their hands, having been paid to them under an Act of Parliament for the use of Mr. Smyth. There was no appeal from such a decision of this Court at that time, but it appears in the argument of a later case, viz., *Rex v. Lords of the Treasury, Ex parte Hand* (6 N. & M. 512), that the decision would have been questioned in a court of error, had the forms of law permitted. Here the grounds of that case do not exist. [COCKBURN, C. J.—In that case, as in this, the money was voted in other sums.] The provision then in force for regulating payments by the Treasury was 4 & 5 Will. 4, c. 15, s. 13, which has been repealed by 29 & 30 Vict. c. 39, s. 46. Coleridge, J., who took part in the *Smyth* case, made some remarks concerning it in the case of *the Baron de Bode* (6 Dowl. 792), and called attention to the particular facts which were expressly the reason for granting the rule. He also calls attention to three other cases reported in the same volume, as being consistent with the first, although in all of them the *mandamus* was not allowed to issue. They were *Re Hand* (4 A. & E. 984); *Re Smyth* (p. 976); *Ex parte Ricketts* (p. 999.) More lately, application was made by way of *mandamus* to recover an apportionment of the annuity granted to Queen Adelaide, the widow of William IV.; but although Lord Campbell is reported (16 Q. B. 361) to have thought the application for a *mandamus* regular, that opinion cannot be taken as a judicial decision, because the Attorney-General expressly waived all objection to the form of the remedy. Moreover, at all events, it is no authority for this case, for Lord Campbell based his opinion upon sect. 13 of 4 & 5 Will. 4, c. 15, which has been since repealed. The last application of this kind for a *mandamus* was made against the East India Company to obtain alleged arrears of pay: (*Ex parte Napier*, 18 Q.B. 692). All the previous cases were there reviewed by Lord Campbell, and the Court refused the rule. In the argument of *Ellis v. Earl Grey*

(6 Sim. 220), a case in the Exchequer, not reported, *Oldham v. The Lords Commissioners of the Treasury*, was mentioned, in which the assignee of a pension filed a bill to compel the Lords of the Treasury to pay him a new pension which had been granted by the king in lieu of the assigned pension which had been revoked. Graham, B., who delivered the judgment of the court, said, "This bill proceeds on the ground of the fundamental jurisdiction of the court over the consolidated fund; and the purpose of the bill is to call on the Court to dispose of the money which has been placed by Parliament at the disposal of the king himself. The jurisdiction of the Court of Exchequer extends only to the reaching the moneys which come into the Treasury, while they are *in transitu*; but after Parliament has disposed of them, and they have reached their destination, the jurisdiction of the barons ceases; and here the king alone can order the payment of the money. The money is granted to the king, his assessors and assigns, and the king himself must be sued by petition of right, if this money is to be got at." There are several American authorities to the same effect, and they may be taken as of greater weight against the jurisdiction here claimed than the English cases, for the ministers in that country occupy positions of more direct and independent power than the heads of departments here. *Brashear v. Mason* (6 Howard's Rep. Sup. Ct. U. S. 92) was a rule for a *mandamus* to compel the United States Secretary of the Navy to hand over arrears of pay to an officer of the Texan navy, alleged to have accrued after the annexation of Texas. Nelson, J., in delivering the opinion of the court, said, at p. 100, "The Constitution provides that no money shall be drawn from the Treasury but in consequence of appropriations made by law. (Art. 1, s. 9.) And it is declared by Act of Congress (Stats. at Large, p. 689, s. 3), that all moneys appropriated for the use of the war and navy departments shall be drawn from the Treasury by warrants of the Secretary of the Treasury, upon the requisitions of the secretaries of these departments, countersigned by the second comptroller. And by the Act of 1817 (3 Stats. at Large, p. 367, ss. 8, 9) it was made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. And all warrants drawn by the Secretary of the Treasury upon the treasurer shall specify the particular appropriations to which the same shall be charged; and the money paid by virtue of such warrants shall in conformity therewith, be charged to such appropriations in the books kept by the comptrollers; and the sums appropriated for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and no others: (2 Stats. at Large, p. 535, s. 1.) In the case of *Mrs. Decatur v. Paulding* (14 Peters, 497) it was held by this court that a *mandamus* would not lie from the circuit court of this district to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due to her as a pension under a

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resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear in that case affirmatively on the application that the pension fund was ample to satisfy the claim. The fund also was under the control of the secretary, and the moneys payable on his own warrant. Still the Court refused to inquire into the merits of the claim of Mrs. D. to the pension, or to determine whether it was rightly withheld or not by the secretary on the ground that the court below had no jurisdiction over the case, and therefore the question was not properly before this court on the writ of error. The Court say that the duty required of the secretary by the resolution was to be performed by him as the head of one of the executive departments of the Government in the ordinary discharge of his official duties; that in general such duties, whether imposed by Act of Congress or by resolution, are not mere ministerial duties; that the head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion; and that the court could not by *mandamus* act directly upon the officer, and guide and control his judgment and discretion in matters committed to his care in the ordinary discharge of his official duties. The court distinguished the case from *Kendall v. The United States* (12 Peters, 524), where there was a *mandamus* to enforce the performance of a mere ministerial act, not involving on the part of the officer the exercise of any judgment or discretion. The principle of the case of Mrs. Decatur is decisive of the present one. The facts here are much stronger to illustrate the inconvenience and unfitness of the remedy. Besides, the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it. The secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and, if not enough, how it shall be apportioned among the parties entitled to it. These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the Government, to the payment of whose demands the particular fund is applicable, are interested as well as the Government itself. At most the secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it; and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned. It will not do to say that the result of the proceeding by *mandamus* would show the title of the relator to his pay, the amount, and whether there were any moneys in the Treasury applicable to the demand; for upon this ground, any creditor of

the Government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ; and the proceeding by *mandamus* would become as common in the enforcement of demands upon the Government as the action of *assumpsit* to enforce like demands against individuals." The first important Act of Parliament relating to the payment of taxation of the costs of prosecutions was 7 Geo. 4, c. 64, which provided by sects. 22 and 23 for an order by the court for payment of expenses of prosecutions. By sect. 24 the order for payment was to be made out by the officer upon the treasurer of the county "who is hereby authorised and required, upon sight of every such order, forthwith to pay to the person named therein, or to anyone duly authorised to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts." By sect. 26 the justices at quarter sessions were to make regulations as to costs and expenses of prosecutions. Each county continued to make regulations for its own costs until 1851, when by 14 & 15 Vict. c. 55, s. 4, the power of quarter sessions to regulate costs was repealed, and by sect. 5, a Secretary of State may make regulations instead.

Manisty, Q.C., and *Gorst*, supported the rule.—No answer being made on behalf of the Treasury to the affidavits upon which the rule *nisi* was granted, it must be assumed that there are funds in the management of the Lords of the Treasury sufficient to satisfy all these demands. It is admitted that no remedy except *mandamus* exists, by which the justices of counties can recover from the Treasury the balance of these costs disallowed by the examiners. It seems that down to the year 1752 there existed no provision for the costs of prosecutions. In 2 Hale's Pleas of the Crown, 282, it is said, "That which is a great defect in this part of judicial administration is, that there is no power to allow witnesses their charges, whereby many times more persons grow weary of attendance, or bear their own charges therein, to their great hindrance and loss." By 25 Geo. 2, c. 36, the reasonable expenses of prosecution for any felony were to be allowed to the prosecutor out of the county stock, if he petitioned the judge for that purpose; and by 27 Geo. 2, c. 3, poor persons, bound over to give evidence were likewise entitled to be paid their charges, as well without conviction as with it. By 7 Geo. 4, c. 64, the expenses of prosecutions were to be regulated by justices at quarter sessions. Nine years afterwards, in the Appropriation Act, 1835 (5 & 6 Will. 4, c. 80), sect. 17, there is an allowance of "110,000*l.* for charges hitherto paid out of county rates for 1835." This amount was granted for the purpose of discharging by the country half of the costs incurred by the several counties. In the year 1846, the grant by the Appropriation Act (9 & 10 Vict. c. 116), s. 18, was 239,000*l.* for "charges formerly paid out of county rates." This was to the 31st March, 1847, and the grant was made to cover the whole of the costs of prosecutions incurred by the counties. In 1847 the grant for the remainder

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of the year was 388,000*l.*; the grant for 1848 was 348,000*l.*; in 1849, 258,000*l.*; in 1850, 240,000*l.*; in 1851, 200,000*l.* In this year, by 14 & 15 Vict. c. 55, ss. 4 and 5, the power of regulating the costs of prosecutions was transferred from the quarter sessions to the Secretary of State, and lists of costs were framed by Sir George Grey under these provisions on the 9th of February, 1858, and on 14th February, 1863. In the year 1857, and for several previous years, the amount appropriated for prosecutions at assizes and quarter sessions was 250,000*l.* In the year 1858, the first after the appointment of the Board of Examiners of Criminal Costs, the amount was 150,000*l.*; in 1860, 100,000*l.* This amount increased in subsequent years, and other charges were included in the appropriation; the words in the Consolidated Fund (Appropriation) Act, 1870 (33 & 34 Vict. c. 96), Schedule B, Part 7, under which this claim is made, are "Civil Services—Class iii. Schedule of sums granted to defray the charges of the several Civil Services herein particularly mentioned, which will come in course of payment during the year ending on the 31st of March, 1871; viz.:" "2. For prosecutions at assizes and quarter sessions in England, formerly paid out of county rates, including adjudications under the Criminal Justice and the Juvenile Offenders Acts, sheriffs' expenses, salaries to clerks of assize, and other officers, and for compensation to clerks of the peace under the Criminal Justice Acts, and other expenses of the same class, 200,633*l.*" [COCKBURN, C. J.—You need not trouble yourselves to argue any question except our jurisdiction to interfere.] At, present, then it will be sufficient to show that this is a case for the return to the *mandamus*; on that point there is no distinction between this matter and that of *Smyth* (4 A. & E. 286). Although sect. 13 of 4 & 5 Will. 4, c. 15, s. 13, has been repealed, its provisions are re-enacted in 29 & 30 Vict. c. 39, s. 14, which is, "When any sum or sums of money shall have been granted to Her Majesty by a resolution of the House of Commons, or by an Act of Parliament, to defray expenses for any specified public services, it shall be lawful for Her Majesty from time to time by her Royal order under the Royal sign manual, countersigned by the Treasury, to authorise and require the Treasury to issue, out of the credits to be granted to them on the Exchequer accounts as hereinafter provided, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted." By paying some of the charges for those prosecutions the Lords of the Treasury admit that all necessary preliminaries required by this Act have been completed, and that they hold the money for the purpose to which it is appropriated. By sect. 6 of 14 & 15 Vict. c. 55, "the amount of such costs, expenses, or compensation, shall be ascertained by the proper officer of the court, according to the regulations made under this Act."

COCKBURN, C. J.—If this case were one in which we in this court could exercise jurisdiction, we should not hesitate to grant a

mandamus. Nothing can be more anomalous and unsatisfactory than the present system of allowing the costs of prosecutions. Everyone will agree that the expenses of prosecutions ought to be borne by the public. It is essential that these costs should not fall on the persons who have suffered individual injuries, which are injuries to the public also; because experience shows that if the expense is to fall on individuals they will not prosecute effectively. The old system was that the costs should be paid out of the rates upon the counties, and they were taxed by proper officers. As far back as 1836 this arrangement was altered, and it was settled that half the expenses should be paid out of the revenue of the country, and in 1847 the whole of the expenses were thrown upon the revenue. The same system of taxation, however, still continued, and the same officers conducted it—that is, the clerks of the peace or the clerks of assize. The Lords of the Treasury, however, thought proper to introduce an excrescence upon the law. They have taken upon themselves for the last fourteen years to review the taxation by the proper officers. I am far from saying that the taxation of costs ought not to be vigorously controlled. It would be a monstrous abuse if prosecutors were allowed by taxing officers to extort from the public purse money not properly expended; but it is a very different thing indeed to say that, instead of taxing on the spot, where all the circumstances attending the prosecution are known, and after the matter had been properly investigated by the proper officers, two gentlemen sitting in London should, by the sole authority of the Treasury, review the taxation and strike off whatever, in the exercise of their discretion, they should think fit to disallow. I am at a loss to conceive what is their supposed authority to tax and disallow bills already properly allowed. The monstrous inconvenience of such a course is palpable. Such gentlemen are naturally, in order to show the usefulness of their office, disposed, whenever they have opportunity, to disallow items. But they cannot have the same means of forming a proper judgment as those who taxed the bills on the spot, and who are acquainted with all the circumstances. It seems monstrous and anomalous that when the court before which the criminal actions have been prosecuted think it necessary, for the due administration of justice, to order particular expenses to be paid, that then two gentlemen sitting in London should over-ride the authority of the court. It is, however, quite another thing to say that this court has jurisdiction to interfere with it, and it is not because it may be an unsatisfactory state of things that, therefore, there is any remedy except by petition to the Queen or to Parliament. We must start with this unquestionable principle, that where a duty has not been performed by the Crown, this court cannot affect to have any power to command the Crown to do it. The thing is out of the question. We are the court of the Sovereign, and have no power to command the Crown. And where persons are acting as servants to the Crown they may be

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amenable to the Crown, whose servants they are, but not to us in the exercise of our prerogative jurisdiction. Therefore the question comes to this—whether the Lords of the Treasury, when this money gets into their hands, receive it, and are bound to apply it, as the servants of the Crown. Now there can be no doubt that we must look upon them as the servants of the Crown. The money is voted by Parliament to the Crown. It is true that the money is appropriated to a specific purpose, and it can be applied to no other. It is also true that the particular mode of obtaining the money is prescribed by statute. But when the money is paid to the Treasury it is paid to them as the servants of the Crown; and though, according to the Appropriation Act, they are bound to apply the money—upon proper vouchers being produced—to the payment of these costs, and had no authority to retax the costs, still I cannot see any duty on them to do what, no doubt, they ought to have done, except as servants of the Crown, in which capacity alone they received the money. Though, therefore, I think they have made a great mistake, and though I think the present state of things extremely anomalous and unsatisfactory, I regret to say that, according to the true principle on which this court's prerogative jurisdiction is and ever has been and ought to be administered, I do not see how we can issue the writ of *mandamus*. The duty of the Treasury is a duty they owe to Parliament and the Crown, and we cannot enforce it in any legal proceeding.

BLACKBURN, J.—I have come to the same conclusion. If we had power to grant the writ, I think it would be right to issue it, as the Treasury have undoubtedly made a mistake. The House of Commons have the exclusive control over the public purse. The House of Lords is practically without authority in such matter. Now, so long as any provision of the House of Commons is, so to speak, *in fieri*, it cannot be brought into this court; but where the money is once granted, the matter is then a bygone thing: it has become an Act of the Legislature, and we must construe it. The Appropriation Act of 1871 regulates what is to be done, and can be altered only by the King, Lords, and Commons. The Commons have by that Act power to vote nothing but what was heretofore payable out of the county rates. Now, what does that mean? Notwithstanding the contention of the Solicitor-General, my view is still unshaken that the meaning is this, viz., that when once these sums have been duly taxed by the proper officer the county is bound to pay them. The officers may have been liberal, or they may have been stingy, but the county is bound to pay what they have allowed. Then the effect of the Appropriation Act was to indemnify the county against expenses, which they are still bound to pay, but which they would not be recouped, but for this Act. The meaning, then, is, the money should be applied to pay those costs which the counties have been obliged to pay. What was done, in fact, was this, though a particular bill had been duly incurred and taxed on the existing law, and consequently the

county was bound to pay it, the Treasury have assumed to advise Her Majesty not to appropriate money to pay back this sum to the county. Now that seems to me very bad advice, being in effect advice to disregard an Act of Parliament. There is a difference, however, between bad advice and malicious advice. Here, no doubt, the advice was honest, though no intelligible ground has been shown for it, but it was advice that ought not to have been given, and ought not to have been followed. Had there been a statutory obligation upon the Treasury, I think we ought to have granted a *mandamus*, for I think that the treasurer of the county rate, who has been obliged to pay the sum originally allowed, has a clear pecuniary interest, and is, therefore, entitled to say that he is grieved by this conduct of the Treasury, and is the proper person to promote proceedings in this court. But it is a general principle of all law that where there is an obligation upon a principal it cannot be enforced against the servant. *Mandamus* will not lie against a servant of a railway company, because the company which employ him have failed to fulfil some duty. There is also the familiar case of surveyors of highways, where, though the parish cannot be made liable, neither can they. The law does not employ a *mandamus* to enforce a duty of the Queen, and where her servants are merely authorised by her, we cannot enforce such an obligation. Such is the rule of all the cases from the time of the case of the Post Office, in Lord Holt's time, where he differed himself, but where it was held that the Postmaster-General was not liable for non-delivery of letters by a carrier. So also it has been held that the party aggrieved could not sue the Queen or the captain of a man-of-war for running down another vessel. Where the wrong-doer is the servant of the Queen, and the duty is to her and to the House of Commons, and nothing more, then a *mandamus* to enforce that duty cannot go. But wherever the duty is imposed by Act of Parliament, I must disclaim the doctrine of the Solicitor-General that any person, however high his station, is not amenable to the jurisdiction of this court. That is, wherever there is a duty to third persons, but I cannot find that such is the case here. No doubt in *Smyth's case* it appears that Lord Campbell, then Attorney-General, advised the Crown to yield, and in the case of *Reg. v. Lords of Treasury* (16 Q. B. 357), he thought the 13th section of 3 & 4 Will. 4, c. 15, cast a specific duty on the Crown. But that case is, perhaps, doubtful, and, at all events, that statute is now repealed. Mr. Gorst argued with great ingenuity that the statutes now in force impose a statutory duty upon the Treasury to the public; yet I was unable to see, in following him through the several sections, but that the money is granted to the Queen, and there is nothing to show that the Lords of the Treasury are more amenable to third parties than servants with money placed in their hands to pay weekly bills, or with a credit at a banker's, who clearly cannot be proceeded against for not applying it as directed. On that ground only, therefore, I think we cannot let this *mandamus* go.

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MELLOR, J.—I am of the same opinion. The recent Acts of Parliament have made no change in the relation of ministers to the Crown, though the jealousy of Parliament has defined the conditions within which they are to act and exercises an indirect authority over them. Still it is a clear principle that we cannot make them perform a duty which they owe to the Crown. But I entertain no doubt whatever that the money really belongs to the counties. I remember when the first remission was introduced by Sir Robert Peel as a set-off to the landed interest. First, the scale was settled by a justice, with consent of a judge of assize; afterwards the justices had power to settle the scale of costs, and a competent person was sent round to look after the taxation in the interests of the public. But now, when the costs are taxed, there is an obligation on the county to pay them which they cannot resist. There is no power by law to review that taxation when once made. The extent of the authority of the Treasury is to require proper vouchers that the money so taxed has been in fact paid. They have got money from Parliament for the specific purpose of defraying these expenses. The true construction of the Act is, that the funds rated are appropriated to the payment of these sums so far as they go; and I am, therefore, entirely of opinion that the Treasury have misunderstood its duty in altering the quantum; but for the reasons already stated, I think we cannot grant a *mandamus*.

LUSH, J.—I am of the same opinion. The applicants have failed to make out any duty between the Treasury and themselves. The Treasury is not accountable to this Court, and there is nothing in the Act to make them so. I think, nevertheless, their practice of retaxing and reducing the sums allowed is a violation of the Act of Parliament. Before 1865, I should have had greater difficulty in saying what the meaning of the Appropriation Act was, whether of the whole or of part of the sum allowed; but the words of those Acts have been altered since then, I presume intentionally.

COCKBURN, C.J.—I may add that there could be no objection to sending officers by the Treasury to assist in and control the first taxation of costs, as was done when the system of regulation by the Secretary of State commenced. Or steps might be taken to secure more consistent taxation throughout the country by means of more definite regulations. When, however, the taxation has been completed by proper officers, the Treasury can have no right to tax the costs again.

Rule discharged.

Attorneys for applicants, *Ridsdale, Craddock, and Ridsdale*, for *Burchall, Wilson, and Hulton*, Preston.

Attorney for defendants, *The Solicitor to the Treasury*.

COURT OF COMMON PLEAS.

June 19, 1872.

(Before WILLES, J., BYLES, J., and KEATING, J.)

PEGGE v. GUARDIANS OF THE LAMPETER UNION.

*Criminal lunatic—Maintenance by guardians—Order of justices—
3 & 4 Vict. c. 54, ss. 1 and 2.*

The 3 & 4 Vict. c. 54, ss. 1 and 2, enacts that if any person imprisoned in any prison shall appear to be insane, it shall be lawful for one of Her Majesty's principal Secretaries of State to direct such person to be removed to a county lunatic asylum, or other proper receptacle for insane persons, until such person has become of sound mind, and has been certified to be so by two physicians or surgeons.

Sect. 2 enacts that it shall be lawful for two justices of the peace to inquire into the place of last legal settlement of such insane person, and if it does not appear that he or she is possessed of any property which can be applied to his or her maintenance, they may direct the board of guardians to pay all reasonable charges for the weekly maintenance of such lunatic.

The defendants had paid from the year 1855, a weekly sum of 16s. to the plaintiff for the maintenance of a criminal lunatic.

On the 19th of October, 1869, the defendants wrote to the plaintiff to say that they in future should pay no more than 11s. 1d. a week for the care of the lunatic. The plaintiff continued to keep the lunatic, and on the defendants still refusing to pay more than 11s. 1d. per week, brought his action to recover the difference. There was no evidence to prove that the plaintiff had ever procured a justices' order to be made on the guardians under the 2nd section of 3 & 4 Vict. c. 54.

Held that it was competent for the guardians to agree to pay for the maintenance of the lunatic without an order of justices; that as the plaintiff could not get rid of the lunatic without an order of the Secretary of State, the defendants could not determine the contract by a notice refusing to pay; also that the Court would infer from the fact of the guardians having paid 16s. a week for fifteen years, that they had agreed to pay 16s. a week as long as the lunatic remained in the asylum.

THE declaration stated that the plaintiff sued the defendants for money payable by the defendants to the plaintiff for care, board, lodging, attendance, and maintenance bestowed and

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supplied by the plaintiff to Mary Hughes, a criminal lunatic, at the request of the defendants, concluding with the ordinary money counts.

The defendants pleaded: First, never indebted; thirdly, payable into Court of 21*l.* 12*s.*

Issue joined.

The action was brought by the keeper of the Briton Ferry private lunatic asylum for the maintenance of one Mary Hughes, a criminal lunatic, from the 24th of December, 1870, to the 24th December, 1871.

In the year 1848 the lunatic was indicted at the Carmarthen Assizes for the murder of her three children, and being found insane, she was ordered to be kept in safe custody during Her Majesty's pleasure. She was accordingly removed to the Devizes Lunatic Asylum, where she remained for several years.

In or about the year 1855 she was removed, by order of the Secretary of State, to the private lunatic asylum at Briton Ferry, where the guardians of the Lampeter Union duly paid for her maintenance.

In the year 1865 an asylum for the counties of Cardigan, Carmarthen, and Pembroke was opened at Carmarthen, and all lunatics belonging to the Lampeter Union confined in various private asylums were removed to the county asylum, but Mary Hughes, being a criminal lunatic, was unable to be removed without a warrant from the Secretary of State, which, however, not being obtained, she remained as before an inmate of the Briton Ferry Lunatic Asylum. The plaintiff had always charged 16*s.* a week for the keep of Mary Hughes, which sum the guardians had paid, but in October, 1869, they wrote the following letter to the plaintiff:

"Lampeter Union, Lampeter, 19th October, 1869.

"*Re* Mary Hughes, a lunatic.

"Dear Sir,—I am directed by the guardians of the poor of this union to inform you that after this date they will not pay you for the care and maintenance of this lunatic a higher amount than they pay for the care and maintenance of lunatics at the joint counties asylum at Carmarthen, which is at present 11*s.* 1*d.* per week.—Yours truly,

"D. LLOYD.

"Charles Pegge, Esq., Vernon House, Briton Ferry."

To this letter Mr. Pegge wrote to say that he could not keep her for so small a sum, but took no further steps in the matter, and in January sent in a claim for 16*s.* a week, but the guardians only sent him a cheque for 11*s.* 1*d.* per week, and on the 18th of February, 1870, wrote the following letter:

"Lampeter Union, Lampeter, 18th February, 1870.

"Dear Sir,—I am directed by the guardians of this union to inform you that they have been advised to resist the payment to

you of any cheques for the care and maintenance of Mary Hughes, a lunatic, beyond the amount remitted by me to you, the same being in the opinion of the guardians a fair and reasonable allowance. The guardians are prepared to defend any action or other proceedings you may bring against them for the recovery of the balance claimed by you.—Yours truly,

“D. LLOYD.

“Charles Pegge, Esq., Vernon House, Burton Ferry, Neath.”

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The plaintiff therefore brought this action for the keep of the lunatic from the 24th of December, 1870, to the 24th of December, 1871, when the defendants paid into Court 21*l.* 12*s.*, being at the rate of 1*l.* 1*d.* per week from the 24th of March, 1871, to the 24th of December, 1871. At the trial before Bramwell, B., and a common jury at the last Bristol spring assizes it was contended for the defendants that the plaintiff ought to have obtained an order of justices under 2 & 3 Vict. c. 54, ss. 1 and 2.(a)

(a) Sect. 1. If any person while imprisoned in any prison or other place of confinement, under any sentence of death, transportation, or imprisonment, or under a charge of any offence, or for not finding bail for good behaviour, or to keep the peace, or to answer a criminal charge, or in consequence of any summary conviction or order by any justice or justices of the peace or under any other than civil process, shall appear to be insane, it shall be lawful for any two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire, with the aid of two physicians or surgeons, as to the insanity of such persons, and if it shall be duly certified by such justices and such physician or surgeons that such person is insane, it shall be lawful for one of Her Majesty's principal Secretaries of State, upon receipt of such certificate, to direct by warrant under his hand that such person shall be removed to such county lunatic asylum or other proper receptacle for insane persons, as the said Secretary of State may judge proper and appoint; and every person so removed under this, or already removed, or in custody under any former order relating to insane prisoners shall remain under confinement in such county asylum, or other proper receptacle as aforesaid, or in any other county lunatic asylum, or other proper receptacle to which such person may be removed, or may have been already removed, or in which he may be in custody by virtue of any like order, until it shall be duly certified to one of Her Majesty's principal Secretaries of State, by two physicians or surgeons, that such person has become of sound mind, whereupon the said Secretary of State is hereby authorised, if such person shall still remain subject to be continued in custody, to issue his warrant to the keeper, or other persons having the care of any such asylum or receptacle as aforesaid, directing that such person shall be moved back from thence to the prison, or other place of confinement, from whence he or she shall be taken, or if the period of imprisonment or custody of such person shall have expired, that he or she shall be discharged.

Sect. 2. That in all such cases as aforesaid, unless one of Her Majesty's principal Secretaries of State shall otherwise direct, it shall be lawful for such two justices, or any other two justices of the peace of the county, city, borough, or place where such person is imprisoned, to inquire into, and ascertain by the best evidence or information that can be obtained under the circumstances, of the personal legal disability of such insane person, the place of the last legal settlement, and the pecuniary circumstances of such person, and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish where they adjudge him or her to be lawfully settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians, established by the Poor Law Commissioners, then the guardians of such union, or of such parish (as the case may be), to pay on behalf of such parish, in the case of any person removing under this Act, all reasonable charges for inquiring into such person's insanity, and for conveying him or her to such county lunatic asylum or receptacle for insane persons, and to pay such weekly sum as they or any two justices shall, by writing under their hands, from time to time direct for his or her maintenance in the asylum or receptacle

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It was proved that at the time that Mary Hughes was sent to the Briton Ferry Lunatic Aylum the guardians wrote to the owner of the asylum stating that they would pay 16s. a week so long as Mary Hughes remained in his custody.

A verdict was found for the defendants, leave being reserved to the plaintiff to move to set it aside and enter a verdict for the sum of 9l. 4s. 1d. beyond the amount paid into Court, on the ground that the facts disclosed ample evidence of a contract by the defendants to pay a reasonable sum to the plaintiff for the maintenance of the lunatic until she was legally discharged from his custody, and in the meantime the judgment should be stayed. The Court were to be allowed to draw inferences of fact. A rule having been obtained,

Kingdon, Q.C., and *Kinglake* showed cause.—The sum of 16s. a week was paid until it was discovered that the cost of lunatics in the joint counties asylum was only 11s. 1d. per week, and after the guardians found out that fact, it became their duty to pay no more for this lunatic. Whatever contract there was between the parties was determined by the guardians' letter of the 19th of October, giving the plaintiff notice that they would not pay more than 11s. 1d. The plaintiff ought to have obtained an order of justices to inquire and determine what sum shall be paid by the guardians under the provisions of the 3 & 4 Vict. c. 54, s. 2, and if he has not done that he must accept the offer of the board of guardians. [WILLES, J.—The guardians are liable for the maintenance of the lunatic; it is only a question of how much they are to pay. The plaintiff cannot get rid of his charge, being a criminal lunatic.] The plaintiff never dared to say that an order of justices had ever been made. [KEATING, J.—Suppose the guardians agreed with the plaintiff to waive the order of justices?] The guardians may waive the order, and the case is reduced to a question of contract determinable by either party. Otherwise we shall have a contract existing between the parties, to bind them through all time. There clearly not having been an order made,

in which he or she shall be confined; and in the case of any person removed under any further Act relating to insane prisoners, to pay such weekly sums as they or any two such justices as aforesaid, shall, by writing under their hands, from time to time direct for his or her maintenance in the asylum or receptacle in which he or she is confined; and when the place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, city, borough, or place where such person shall have been imprisoned; but if it shall appear upon inquiry to the said, or any other two justices of the county, city, borough, or place where such person is imprisoned that any such person is possessed of property, such property shall be applied for or towards the expenses incurred, or to be hereafter incurred on his or her behalf, and they shall from time to time, by order under their hands, direct the overseers of any parish wheresoever any money, goods, chattels, land, or tenements, of such person shall be, to seize so much of the said money, or to seize and sell so much of the said goods and chattels, or receive so much of the annual rent of the lands or tenements of such person as may be necessary to pay the charges, if any, of inquiring into such person's insanity and of removal, and also the charges of maintenance, clothing, medicine, and care of any such insane person, accounting for the same at the next special petty sessions of the division, city, or borough, in which such order shall have been made, such charges having been first proved to the satisfaction of such justices, and the amount thereof being set forth in such order.

we ought not to act as if there had been one : (*The Bradford Union v. The Olerk of the Peace for the County of Wiltshire*, L. Rep. 3 Q. B. 604.) Although in all cases within the scope of this authority, a contract of the guardians binds them without being under seal, yet this was not a contract which they had power to make : (Chitty on Contracts, last edit., p. 265, and cases there cited ; *Nicholson v. The Guardians of the Bradfield Union*, L. Rep. 1 Q. B. 620.) We do not contend that 16s. is an unreasonable sum to pay, but that the plaintiff is entitled to no more than 11s. 1d. per week.

H. James, Q.C. (*Pinder* with him) were not called upon.

WILLES, J.—This case turns on the construction of 3 & 4 Will. 4, c. 34, and the course taken by the guardians under that Act. The case turns on the statute, because by it any person in the position of the lunatic may be dealt with and sent to a lunatic asylum under the order of the Home Secretary. It occasionally happens that a person in a good condition of life commits an offence, and being adjudged by the verdict of a jury to be a lunatic, is sent to a public lunatic asylum, thereby throwing the cost of maintenance upon the union, when the friends of the lunatic would rather pay a small sum and have the advantage of the treatment of a private lunatic asylum. In any case of the kind two questions arise, whether the lunatic should be sent to a private or public asylum. It becomes necessary, when persons are sent to a private asylum, to provide for the mode of their maintenance, and that is provided by the second and following sections, and the justices are given power, where the lunatic is possessed of property and is a person of means, to issue their warrant to the overseers to seize the money or sell the goods and receive the rents of the lunatic for the purpose of paying the expenses of the lunatic's keep ; but in the case of a pauper lunatic, the justices are to make an order upon the guardians of the union to pay such weekly sum for the maintenance of such person as they shall by writing under their hands direct. I need hardly say that if the owner of a private asylum accepts the care of a criminal lunatic under the order of the Secretary of State, he is bound to keep him ; but there seems nothing in the statute obligatory to keep him in the first instance. That, however, it is not necessary for us to decide here ; it is only necessary to state that once having accepted such care, nothing would entitle the keeper to transfer the lunatic except the warrant of the Secretary of State to remove the lunatic from his custody. The plaintiff here was, therefore, obliged to continue to keep Hughes until he received an order for her removal. We are, by the leave reserved at the trial, allowed to draw inferences of fact, and I draw the inference that the plaintiff was maintaining the lunatic on behalf and at the request of the guardians of the Lampeter union. The 2nd section says that it shall be lawful for two justices of the peace to inquire into and ascertain the personal legal disability of any insane person, the place of

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last legal settlement, and his or her pecuniary circumstances; and, if it does not appear that he or she is possessed of any property which can be applied to his or her maintenance, they may direct the overseers or the board of guardians, as the case may be, to pay all reasonable charges for inquiring into such persons' sanity and for their weekly maintenance at an asylum or receptacle for insane people; and if they have any property they, the justices, are authorised to direct such property to be applied on behalf of their maintenance so long as they remain in confinement. The result of the section is that any lunatic who turns out a pauper shall be maintained by the guardians of the union to which he or she formerly belonged. The justices are to inquire and to act, but the guardians are liable to pay. If the individuals who are to pay choose to waive the expenses of an inquiry before the justices and the provisions of the statute, and pay without such inquiry, they are at liberty to do so. As to the expenses of the lunatic, they would only pay a reasonable sum for her maintenance, for what was a reasonable sum they could ascertain as well as the justices, and it necessarily results from the fact that the guardians paid 16s. per week for sixteen years, without objection, that the plaintiff considered that if he took the lunatic to his asylum he would have 16s. per week as long as he kept her, and this is the inference we draw. The guardians, however, instead of keeping to their contract, attempted by their notice of the 19th of October to strike off 4s. 11d. a week, although the order of justices, and we may assume there was one, was still unaltered. There was clearly an agreement to pay 16s. or a reasonable sum to sustain the plaintiff's right, which could not be altered by the guardians. As to the question whether a right of action given by statute would lie on the statute, I am of opinion that it would, as it is clearly stated by Comyns, C.B., in his Digest, title Action upon the Statute (F), where he refers to 2nd Inst. 486: "If a statute provide a remedy for a party grieved, though it do not give any express penalty or forfeiture he may have an action on the statute."

BYLES, J.—I am of the same opinion. There was clearly at one time an actual contract for 16s. a week until the lunatic should be removed. The defendants refused to continue to pay 16s., and proposed to substitute 11s. 1d., the same as they paid for lunatics at the joint counties asylum. The plaintiff accepts the lunatic on the understanding that he is to receive 16s. a week, and when he has once got her he cannot turn her out, and she must remain on his hands until an order of removal is obtained from the Home Secretary.

KEATING, J.—I am of the same opinion. Previously to 1871 there must have been some arrangements made between the guardians and the keeper of the lunatic asylum, and I think we are at liberty to assume an order was made. Otherwise, the guardians being satisfied that the maintenance of Mary Hughes must fall on them, entered into an agreement to pay 16s. a week.

If that is so, the only question that remains is whether they could make such a contract, and for the reasons given by my brother Willes it appears that they were able to contract and be bound by such contract. The rule must, therefore, be made absolute.

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Rule absolute.

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Attorneys for plaintiff, *Wrentmore*, for *Jones and Curtis*, Neath.
Attorneys for defendants, *Humphreys and Morgan*, for *David Lloyd*, Lampeter.

VICE-CHANCELLOR MALINS' COURT.

November 8, 1872.

Re DAVIS'S TRUSTS.

Construction of will—Class, when ascertained—Felon's share claimed by Crown.

Testator bequeathed to his son S. "the interest of 2000l., to be paid him by my executor yearly so long as he lives, and then the principal to be divided amongst my real sons and daughters that are living, except my son that has the interest paid him." The will contained no residuary gift. The testator left S., and eight other children, who all predeceased S.

Held, that the class amongst whom upon the death of S. the 2000l. was to be divided, must be ascertained at the death of S., and that, the gift over failing, and there being an intestacy, the next of kin of the testator living at his death were entitled.

R., one of the eight children, was convicted during the life of S. of felony, and died in prison. His interest under the will having been claimed by the Crown :

Held, that the claim of the Crown could not be sustained.

THIS was a petition for the payment out of Court of a sum of 2235l. 6s. 6d. New Three per Cent. Annuities, which had been transferred into Court under the following circumstances.

By his will, dated the 9th of March, 1831, Henry Davies, after bequeathing some other pecuniary legacies, made the following bequest, "I give unto my son Stephen Hles Davis, the interest of

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2000*l.* to be paid him by my executor yearly as long as he lives, and then the principal to be divided amongst my real sons and daughters that are living except my son that has the interest paid him." The will contained no residuary gift.

The testator died on the 6th of June, 1833, leaving his son Stephen and eight other children him surviving. The 2000*l.* comprised in the above bequest was invested by the testator's executors in the purchase of 2235*l.* 6*s.* 6*d.* New Three per Cent Annuities, the interest of which was paid to Stephen Iles Davis during his life.

On the 20th of May, 1871, Stephen Iles died, and at the time of his death there were none of the testator's other children living.

On the 19th of December, 1865, the above sum had been transferred into Court, and a petition was now presented praying that the above annuities might be sold and divided among the testator's other eight children, and the shares paid to their respective representatives.

Robert Davis, one of those children, on the 5th of October, 1860, was convicted of felony, and sentenced to a term of imprisonment, and on the 30th of January, 1861, he died, before his sentence had expired.

Joliffe, for the petitioners, contended that the class amongst whom the 2000*l.* was to be divided upon Stephen's death, was to be ascertained at the death of the testator. The testator could not have intended the money to be divided amongst those who survived Stephen, because he added the words, "except my son that has the interest paid him."

Lovell, for the testator's next of kin, contended, on the authority of *Neathway v. Reed* (3 D. M. & G. 18), that the class must be ascertained at Stephen's death; and inasmuch as none of the testator's other children were then living, the gift over failed; and there being no residuary gift, there was an intestacy, and the testator's next of kin were entitled.

Hemming, for the Crown, claimed the share of Robert Davis, the felon.

Lovell, on behalf of Robert Davis, contended that his contingent interest under his father's will was not forfeited. He referred to *Stokes v. Holden* (1 Keen, 145).

The VICE-CHANCELLOR said that in the present case the testator gave the interest of 2000*l.* to his son Stephen "so long as he lives, and then" (that is, when he no longer lives) "the principal to be divided amongst the testator's sons and daughters that are living." Living when? It was clear that the testator meant his sons and daughters who should be living when Stephen was no longer living. Therefore the class must be ascertained at Stephen's death. No doubt there was an inconsistency, because the will goes on to except Stephen from the gift over; but that only showed that the testator was anxious to explain that Stephen was to have an interest for life only. Therefore, in

spite of that inconsistency he must hold that the survivorship was referable to the period of Stephen's death. As there were none of the testator's other children then living, the gift over failed. The will contained no residuary gift; there was, therefore, an intestacy, and the next of kin of the testator living at the time of his death were entitled. He had further to deal with the claim of the Crown in the case of Robert Davis. Under the testator's will this capital sum was given upon Stephen's death contingently to a class. During the life of Stephen the capital must have been vested somewhere. If the case had been realty devised to Stephen for life, with remainder to the testator's children living at Stephen's death, then during Stephen's life the fee would have vested in the testator's heir. So in the case of personalty, the capital during Stephen's life was vested in the testator's next of kin. On Stephen's death that which before had been vested in the testator's next of kin, subject to the contingency of being divested in favour of a class, became absolutely vested in the next of kin. Under these circumstances, did the share of one of the testator's next of kin who was convicted of felony during Stephen's life become forfeited to the Crown? In the case of *Stokes v. Holden*, which had been referred to during the argument, a person who was entitled to a legacy contingently upon attaining twenty-one was sentenced to imprisonment, and then discharged. He afterwards attained the age of twenty-one. The legacy which then became vested and payable was claimed by the Crown; but it was held by Lord Langdale that the legacy being contingent was not forfeited to the Crown. According to the principles stated in that case the felon's property to be forfeited to the Crown must be immediately recoverable. In the present case Robert Davis had certainly no interest immediately recoverable. In one sense the capital was vested in the testator's next of kin, but it was not vested absolutely. It was still contingent whether the next of kin would take or whether the children would take. He must, therefore, hold that the share of Robert Davis belonged not to the Crown, but to his next of kin.

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Solicitors: *Lovell, Son, and Pitfield; Raven and Bradley.*

COURT OF EXCHEQUER.

November 22, 1872.

(Before KELLY, C.B., MARTIN, BRAMWELL, and CHANNELL, BB.).

RICHARDSON v. WILLIS.

Practice—Jurisdiction—Indictment at assizes for libel—Acquittal of defendant—Action by defendant against prosecutor for costs—Declaration alleging trial and acquittal—Plea, “Nul tiel record”—Evidence—Certified copy of record of acquittal—6 & 7 Vict. c. 96, s. 6—14 & 15 Vict. c. 99, s. 13.

1. *An action brought in a Superior Court, under 6 & 7 Vict. c. 96, s. 8, to recover the costs sustained by the plaintiff upon the trial of an indictment for libel preferred against him at the assizes by the defendant, upon which trial a verdict of “Not guilty” was returned, and judgment was given for the plaintiff, who was duly discharged, is a “proceeding” in which, under sect. 13 of the Evidence Amendment Act (14 & 15 Vict. c. 99) a certified copy of the record of such trial and acquittal, under the hand of the proper officer of the court of assize, is admissible in evidence in proof of such trial and acquittal, in answer to a plea of “Nul tiel record.”*
2. *The issue on a plea of “Nul tiel record” is triable by the Court, and not by a jury, and is proved by the production, in open court, of the record itself, or a duly certified copy of it.*
So held by the Court of Exchequer (Kelly, C.B., and Martin, Bramwell, and Channell, BB.).

THIS was a motion on the part of the plaintiff for judgment on an issue on a plea of *Nul tiel record*. The defendant had indicted the plaintiff for a libel, and on the trial of the indictment, on the Crown side of the Court, at the last Essex Assizes at Chelmsford, before Martin, B., and a jury, the plaintiff was acquitted, and thereupon, under sect. 8 of the statute (6 & 7 Vict. c. 96), became entitled to the costs sustained by him by reason of the said indictment; it being enacted by that section that, “in the case of any indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment shall be given for the defendant, he shall be *entitled to recover* from the prosecutor the costs sustained by the said defen-

dant by reason of such indictment or information such costs so to be recovered to be taxed by the proper officer of the court before whom the said indictment or information is tried." The costs so sustained by the now plaintiff by reason of the said indictment against him for libel by the now defendant were duly taxed by the deputy clerk of assize for the Home Circuit at 52*l.* 8*s.* Being unable to obtain a side bar rule for their payment, in consequence of the indictment not having been removed by *certiorari* into the Queen's Bench, the plaintiff brought an action for the recovery of them against the defendant.

The declaration charged that, after the passing of the Act 6 & 7 Vict. c. 96 (amending the law respecting defamatory words and libel) the defendant, then being a private prosecutor within the meaning of the said Act, appeared at the assizes holden in and for the county of Essex, and indicted the plaintiff upon the charge of falsely and maliciously publishing a defamatory libel of and concerning the defendant, and, as such private prosecutor as aforesaid, preferred a bill of indictment thereof against the plaintiff before the grand jury, and gave evidence before the petty jury on the same; and that the said petty jury acquitted the plaintiff of the premises in the said indictment so charged upon him as aforesaid, and found him "Not guilty" upon the same; whereupon *judgment was given for the said plaintiff*, and he was duly discharged of and from the premises in the said indictment specified; whereby, and by reason of the aforesaid statute and of the premises, the plaintiff became entitled to recover from the defendant the costs sustained by him, the said plaintiff, by reason of such indictment as aforesaid, and the said costs were duly taxed by the proper officer of the court before which the said indictment was tried, as by the aforesaid statute is directed, and the same were allowed at the sum of 52*l.* 8*s.* Averment of the performance, happening, and elapsing respectively of all conditions, things, and times necessary to entitle the plaintiff to the payment of the same. Yet—breach assigned, the refusal of the defendant to pay the said sum so taxed and allowed, which still was unpaid and owing to the plaintiff.

The defendant pleaded and demurred to the said declaration as follows: Pleas—first, *Nul tiel record*; secondly, that the defendant did not indict the plaintiff as alleged; thirdly, that the defendant was not a private prosecutor in preferring or giving evidence on the said indictment; fourthly, that the said costs were not duly taxed as alleged; fifthly, demurrer to the declaration as bad in substance.

A ground of demurrer relied on (amongst others) by the defendant was that an action does not lie for the costs claimed, the remedy being by rule of Court.

Replication—first, as to the first plea, that there is a record of the said judgment remaining in the said court of assizes of oyer and terminer and general gaol delivery, as the plaintiff hath above alleged, and the plaintiff prays that the said record may be

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inspected by the Court here; and hereupon *the plaintiff is commanded that he have the same here on Friday, 22nd November, 1872,* and the same is given to the defendant at the same place, &c.; secondly, joining issue on the second, third, and fourth pleas respectively; thirdly, joinder in demurrer to the declaration.

Notice, that the plaintiff would, on the 22nd of November, produce to the Court of Exchequer the above-named record of the said judgment, was duly served by the plaintiff's agent on the defendant's attorneys.

The 14 & 15 Vict. c. 99 (the Act to Amend the Law of Evidence), enacts as follows:—Sect. 13. "And whereas it is expedient as far as possible to reduce the expense attendant upon the *proof* of criminal proceedings, be it enacted, that whenever, *in any proceeding whatever*, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and *judgment* or acquittal, as the case may be, omitting the formal parts thereof."

Philbrick, on the part of the plaintiff, produced, under sect. 13 of the 14 & 15 Vict. c. 99, a properly certified copy, under the hand of the deputy clerk of assize, of the record of the trial and acquittal of the plaintiff as in the replication and declaration respectively mentioned; and thereupon he prayed for judgment for the plaintiff on the issue above mentioned.

Willis, for the defendant *contra*, moved for judgment for the defendant, and contended, in the first place, that the plaintiff's motion was misconceived. The application to produce the record of the trial and judgment could only be made to the court of assize where the judgment was. It is an issue triable by a jury, and not by this court. Had there been a record in the Exchequer it might be conceded that the plaintiff's application would have been well founded. But where an action is brought on an acquittal which took place before a court of assize, the question can only be determined in that court, and by a jury, and there is no authority for bringing the present defendant here. [KELLY, C. B.—Is there any authority one way or the other? MARTIN, B.—It is laid down in the books of practice that the issue on a plea of *Nul tiel record*, where the record of another court is pleaded, must be tried by *the court* and not by a jury, and must be proved by the production of a transcript or exemplification of the record in open court: (2 Chit. Arch. Pract., 12th edit., p. 940.) And in 2 Tidd's Pract., 8th edit., it is said at p. 773, "An issue is either in law upon a demurrer, or in fact, which is triable by the court upon *Nul tiel record*." And again,

at p. 108, "the issue of *Nul tiel record* is triable by the record itself if it be of the same court, or by the tenor of it if it be of a different court." The defendant is not here pleading any proceedings in another court in bar of the present proceedings, nor does the judgment produced here show the plaintiff to be entitled to any costs at all. [BRAMWELL, B.—Suppose the action had been brought in the Queen's Bench or in this court, would that document have been evidence then?] It would seem that, upon the authorities referred to by Martin, B., it would. [BRAMWELL, B.—What difference is there between that case and the present one?] But again, sect. 13 of the Evidence Amendment Act (14 & 15 Vict. c. 99) as clearly as can be, confines the matter to a "*criminal proceeding*" and does not extend to an action, the result or consequence of a criminal proceeding; and therefore the record itself ought to be produced, the "certified copy" which is made evidence by that section applying to proof in "*criminal proceedings*," only.

KELLY, C. B.—I am of opinion that the plaintiff in this case is entitled to the judgment of the court. No authority has been produced to us to support Mr. Willis's proposition, that the issue to be decided in the present case should be, or rather must be, tried before a jury. On the contrary, when we come to look into the matter, we find it to be clearly laid down in the books of practice, to which my brother Martin has referred in the course of the argument, as a decided and undoubted rule that such an issue shall be tried by the court or a judge, and not by a judge and a jury; and that the question is settled by the production in court of the record itself, or a certified copy of it. The contention, therefore, which has been argued for to-day by the defendant's counsel is not, I think, maintainable. A second question then was raised, namely, whether the acquittal obtained by the defendant in another court must be proved in this court by the production of the record itself, or whether it would be sufficient under sect. 13 of the Evidence Amendment Act (14 & 15 Vict. c. 99), that it should be proved by the production of a copy of the record of the trial and acquittal, certified under the hand of the proper officer of the court of assize in which the trial and acquittal took place. Now the preamble of that Act says, "Whereas it is expedient, as far as possible, to reduce the expense attendant," not upon criminal proceedings, but "*upon the proof of criminal proceedings*," and it was strongly urged before us by Mr. Willis that this "certified copy" was only sufficient in a "*criminal proceeding*." Now, is there any doubt in the present case, that it is expedient to produce this document not in a "*criminal proceeding*," but "*in proof of a criminal proceeding*." Again, the words of the statute are, "whenever in *any proceeding whatever* it may be necessary to prove the trial and conviction or acquittal of any person," &c.—words which are as large as words can be. In the present case it is not the *trial*, not the *conviction*, but the *acquittal* of the person. Is there, then,

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anything in the latter part of the section which can be taken to limit the operation of the former part of it. I cannot think that there is. Most clearly this is a proceeding in which it became necessary to prove *the acquittal* of the person, the defendant, within the meaning of sect. 13. The objection raised on the part of the defendant, in my judgment, fails entirely, and the plaintiff therefore is entitled to judgment.

MARTIN, B.—I am quite of the same opinion.

BRAMWELL, B.—I am of the same opinion. The first objection taken by Mr. Willis is that the issue in this case cannot be tried by this court, but must be decided by the court of assize, which tried the indictment against the present plaintiff, and a jury. Now I am entirely against Mr. Willis on that point, and so are the books of practice. Another point, which has not been taken at the bar, has occurred to me, which is probably only one of form. On the present record in this court the plaintiff is distinctly directed or “commanded” to have the record here in court, to be inspected by us; yet Mr. Willis, on the part of the defendant, has argued that we should not and could not do the very thing which we as a court have already said we would do. If that be so, his course should have been to have moved in the first place to rescind that direction or command of the court on the ground that it was improper as being *ultra vires*. With regard to the second objection urged by Mr. Willis, there is no limitation, in the 13th section of the Act, to proof in “criminal” proceedings. The words are as wide and general as they possibly can be, “any proceeding whatever.” There is another point which did occur to me, and to which I made allusion in the course of the argument. The first part of the section in question specifies only the proof of “the trial and conviction or acquittal of any person,” and for a moment I was inclined to think that it might be said that the section would not apply to a judgment; but a consideration of the latter part of the section disposes of that objection at once, for the words there used are “the record of the indictment, trial, conviction, and judgment, or acquittal.”

CHANNELL, B.—I am of the same opinion. The question is, is this document a certified copy, under the hands of the proper officer, of the record of the trial and acquittal of the plaintiff, and, if so, is it receivable in evidence as proof of such trial and acquittal? I am of opinion that it is, and that sect. 13 of the Act in question (14 & 15 Vict. c. 99), expressly makes it so.

Judgment for the plaintiff, as prayed, with costs.

Attorneys for the plaintiff, *J. and R. Oldman*, 8, Gray's-inn-square, W.C.

Attorneys for the defendant, *Evans, Laing, and Eagles*, 10, John-street, Bedford-row, W.C.

COURT OF QUEEN'S BENCH.

November 21, 1872.

(Before COCKBURN, C.J., MELLOR, and BLACKBURN, JJ.)

Ex parte BOUVIER.

Extradition — Prisoner convicted in France — Surrender to authorities under Extradition Act, 1870 (33 & 34 Vict. c. 52).

The applicant, who had been an *avoué* in France, was now a prisoner in Jersey. He had been convicted *par contumace*, by the *Cour d'Assize de Côtes du Nord*, of three offences, *abus de confiance*, or breach of trust, fraudulent bankruptcy, and forgery. The first of these three offences is not one for which a surrender is stipulated by the French treaty of 1843, or by the statute confirming it, viz., 6 & 7 Vict. c. 75, and there has been no extradition treaty with France since. By 33 & 34 Vict. c. 52, s. 3, sub-sect. 2, a fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." By sect. 4, "an order in council for applying this Act in the case of any foreign state shall not be made unless the arrangement. . . . (2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act. By sect. 27, 6 & 7 Vict. c. 75, amongst other Acts, is repealed, "and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign states with which those treaties are made, in the same manner as if an order in council referring to such treaties has been made, in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." Affidavits concerning the French law were produced by both sides.

Upon a rule for a *habeas corpus* directing the Governor of Jersey

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Prison to produce the applicant, the court expressed doubts as to the exemption of old treaties from the restrictions of the Act of 1870. They held, however, that the French law, although the affidavits were contradictory, carried out the restriction provided for.

THIS was a rule calling upon John le Rossignol, Governor of Her Majesty's prison in and for the Island of Jersey, to show cause why a writ of *habeas corpus* should not issue to have before this court the body of Alfred Louis Marie Bouvier, who was detained in the said prison, to undergo and receive all and singular such matters and things as the court shall then and there consider of and concerning him in this behalf.

It appeared from the affidavits upon which the rule was granted that Bouvier was arrested and lodged in the said prison on the 22nd of October, 1872, on a warrant granted under the Extradition Act, 1870, by Her Majesty's Principal Secretary of State for the Home Department, and endorsed by the bailiff of the said Island of Jersey. On the 24th of October he was taken before the police magistrate of the said island on such warrant, and was by him ordered to be handed over to the French authorities, being in the meantime sent back to prison, there to remain for the period of fifteen days, being the time allowed by the said Extradition Act, 1870, for obtaining a writ of *habeas corpus* or to bring other measures for an appeal from the said order. The warrant had been granted upon a judgment of *La Cour d'Assize de Côtes du Nord*, in France, dated 10th of July, 1872, on which judgment Bouvier had been condemned on three several charges of *abus de confiance*, *forgery*, and *fraudulent bankruptcy*. By the convention between Her Majesty the Queen and His Majesty the King of the French, signed at London, February 13th, 1843, and which is the only convention in force between England and France for the extradition of criminals, it was "agreed that the high contracting parties shall, on requisition made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes of murder (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide, and poisoning), or of any attempt to commit murder, or of forgery, or of fraudulent bankruptcy, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other," &c. It appeared, therefore, that *abus de confiance* was not an offence included in the above convention, and it was alleged in the affidavit of A. L. M. Bouvier "that as a judgment is indivisible (*judicatio est tota in totâ, et tota in quâlibet parte*), the surrendering of me to the French authorities on a judgment, one of the offences for which such judgment has been given not being comprised in the said Extradition Act, 1870, would be surrendering me to punishment for an offence not contemplated by the said Act, and would consequently be in violation of such Act."

On the 4th of December, 1865, notice was given by the French Government to terminate the above-mentioned convention on the 4th of June, 1866, but it has been continued in force from mutual agreement, and is now declared to be in force till the 1st of September, 1873. On the 28th of March, 1852, a new convention was concluded with France for the surrender of criminals, but it was not sanctioned by Parliament, and it has therefore never had any effect.

The order of the police magistrate of the said island of Jersey was as follows :

“ Police Correctionnelle.

“ Oct. 24, 1872.—Alfred Louis Marie Bouvier, faux et banqueroute frauduleux, envoyé en prison pour être remis aux autorités Françaises après quinze jours.

“ G. T. MARETT, St. D.”

By 33 & 34 Vict. c. 52, s. 3, sub-sect. 2, a “fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to Her Majesty’s dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded.” By sect. 4, “an order in council for applying this Act in the case of any foreign state shall not be made unless the arrangement. . . . (2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act.”

In moving for the rule, it was contended that neither under the treaty or convention, or under the Extradition Act, 1870, was there any power to surrender a fugitive criminal for the offence of *abus de confiance*; that only the crime of fraudulent bankruptcy was mentioned in the warrant; and that by sect. 3, sub-sect. 2, of the Extradition Act, 1870, there was no power to surrender the criminal, inasmuch as no provision or arrangement had been made as intended by that sub-section.

In showing cause against the rule, the following affidavit was used :—

“ I, Adolphe Moreau, of No. 5, Chancery-lane, in the county of Middlesex, Esq., make oath and say :

“ 1. I am the officially appointed counsel to the French Embassy in London, and I am well acquainted with the law and constitutions of France, and that part thereof which relates to legal proceedings in matters of extradition.

“ 2. I say, speaking from such knowledge, that according to the law of France provision is made that a fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty’s dominions, be detained or tried in France for any offence committed by him prior to such surrender other than the extradition crime, proved by the facts upon which the surrender is granted; and I say, speaking from my own know-

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ledge and experience, that this law is observed in practice by the French tribunals and authorities.

"3. The general principles and rules of the French law in matters of extradition are comprised in a circular dated 5th April, 1841, containing the special instructions of the Minister of Justice (*Garde des Sceaux*) to the law officers of the Government. This circular is printed at length in a book entitled "*Monographie Alphabétique de l'Extradition, par Erariste Blondel*," which is now produced and shown to me, marked A, and which is a recognised authority and book of reference in the French courts; and I say, speaking from my own knowledge and actual experience, that the law is correctly laid down in such circular, and is the law followed by the French courts in such matters.

"4. It is a principle of French and of international law that the individual whose extradition has been granted can only be prosecuted and tried for the very crime for which his extradition has been obtained; and I say, speaking from my own knowledge and actual experience, that this is the invariable practice of the French tribunals.

"5. All these principles and rules are to be found laid down by Monsieur Felix as principles and rules of international law in his '*Traité du Droit International privé*,' vol. 2 of which is now produced and shown to me, marked B, in which he specially refers to the above circular as containing a *résumé* of such principles and rules; and I say, speaking from my knowledge and actual experience, that international law is accepted as binding law by all the French tribunals, and that the said work of Monsieur Felix and the said circular are accepted by all such tribunals as binding authorities, and that the practice of such tribunals in such matters conforms to the law as laid down in the work of Monsieur Felix and the said circular.

The *Attorney-General* (Sir J. D. Coleridge) and *Bowen* showed cause against the rule.—The 6 & 7 Vict. c. 75, which was passed to give effect to the treaty of 1843, referred to in the affidavits, is repealed; the Extradition Act now in operation is the 33 & 34 Vict. c. 52 (The Extradition Act, 1870), and all that is necessary to ascertain in the present case is whether the proceedings which have been taken are authorised by that Act. The affidavits show that the machinery provided by it has been followed. By the 22nd section "this Act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and Isle of Man in the same manner as if they were part of the United Kingdom, and the Royal Courts of the Channel Islands are hereby respectively authorised and required to register this Act." The order made by the police magistrate referred to in the affidavits is therefore warranted, as he had the same power as a police magistrate in England would have. Then by sect. 27 it is provided that "the Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in

the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign states with which those treaties were made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." The condition imposed by sect. 3, sub-sect. 2, is inconsistent with the treaty. If, therefore, the machinery of the Act has been followed, the case is the same as if an Order in Council had been made. If the condition in sub-sect. 2 of sect. 3. is inconsistent with the treaty, it does not apply. The matter is made more clear by the 18th section, which provides that, "if by any law or ordinance made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect, within such possession, the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act, in the case of any foreign state, or by any subsequent order, either suspend the operation, within any such British possession, of this Act, or of any part thereof so far as it relates to such foreign state, and so long as such law or ordinance or any part thereof shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act. The intention was to make a general Act which should apply to all cases except where there was anything inconsistent with the treaties referred to. The treaty of 1843 is one of such treaties, and there being something in sect. 3, sub-sect. 2, inconsistent with the treaty, the condition so imposed does not apply to that treaty. But, further, the objection which was taken to the proceedings in moving for the rule is answered by the affidavit of Adolphe Moreau. It is clear that Bouvier could not, until he had been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for the offence of *abus de confiance*, or for any offence committed by him prior to such surrender, other than the extradition crime proved by the facts upon which the surrender is granted. The law of France is not as stated on behalf of Bouvier. This court will be guided by the statement of the law by a person in the position of M. Moreau, as described in his affidavit, the more so as the circular to which he refers is also referred to by an author of such repute as M. Felix : (see the passage referred to at vol. 2, p. 333.) [Stopped by the court.]

G. Browne, in support of the rule.—Under sect. 3, sub-sect. 2, the court will order the discharge of the prisoner Bouvier. It is not clear that by the law of France provision is made that he shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for any offence other than the extradition crime proved by the facts on which the surrender is grounded. M. Moreau is not justified in

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his declaration of the law of France, which is contrary to that set forth in Bouvier's affidavits, and the cases cited from Dalloz at p. 93 of Clarke upon the Law of Extradition: "The rule that a prisoner surrendered upon a charge of crime, but accused also of misdemeanor, should only be tried for the crime, has been acted upon in the case of *Dermenon*, who was given up by Geneva in 1840 on a charge of fraudulent bankruptcy. The *renvoi* of the *Chambre de Mises en Accusation* ordered that if acquitted on this charge he should be tried for simple bankruptcy and breach of trust. He was so acquitted, and the Minister of Justice held himself bound to re-deliver him to Geneva. That State refused to receive him; but the question whether this operated as a new extradition, or whether he ought to be liberated at the French frontier, was held to be a purely political matter: (Dalloz, *Jurisp. Gén.* 1840, I., 438.) The rule was also recognised in the case of *Sauve*, a deserter from the French army, accused of theft. He was delivered up by Switzerland on the express condition that he should not be tried as a deserter, but only for the theft, for which he had been condemned *par contumace*. It was held in this case that the judges, empowered according to the information to judge of the misdemeanor as well as the crime, ought to declare themselves without jurisdiction over the former. *Sauve* was tried and condemned as a deserter, but this judgment was overruled by the *Conseil de Révision* of Paris, and he was sent back to be allowed to purge his contumacy, and to be tried for the thefts charged against him: (Dalloz, *Jurisp. Gén.* 1862, V. 159.)" Other cases, however, show that the principle must be taken with some modifications: "In the case of *Wolf Cromback*, in 1845, the prisoner was delivered up by Switzerland for "*faux en écriture de commerce*." The order of extradition was general, but this was the only description of forgery specified in the treaty under which he was claimed. On his trial the writings proved not to be of a commercial character, and he was convicted of '*faux en écriture privée*.' He thereupon prayed the court that he might be sent back to Switzerland, quoting *Dermenon's* case; but this point was overruled, and he was sentenced to five years of '*réclusion*' and to '*l'exposition*.' He appealed to the *Cour de Cassation*, which, after deliberation in *Chambre de Conseil*, decided that, as the treaty provided for the delivery up, not only of those declared guilty, but of those pursued as such in virtue of warrants certified by the proper legal authority, the legality of the extradition and of its consequences must be tested, not by reference to the gravity and legal character of the crime as described in the sentence of condemnation, but with regard to the original charge against him upon which he was pursued. The appeal was therefore rejected: (Dalloz, *Jurisp. Gén.*, 1845, I., 3.) In the same year the *Abbé Grandfaux*, charged with '*faux en écriture privée et d'enlèvement de mineure*,' was given up by Tuscany, with an express stipulation that he should not be tried for the

latter offence. The *Chambre des Mises en Accusation*, however, finding there were no sufficient grounds for the heavier charge, remanded him, and instructed the *Cour d'Assises* to try him for the smaller offence. On appeal against this *arrêt*, the *Cour de Cassation* held that the Criminal Courts must proceed without regard to the conditions of extradition. That was a matter for the consideration of the Government, which might prevent the execution of the sentence and redeliver the criminal: (Dalloz, *Jurisp. Gén.* 1845, I., 405.) The other French decisions refer chiefly to the incompetence of the tribunals to consider the legality of the surrender which has been made. The doctrine was fully laid down in the case of *Burgeroy* in 1841. He was given up by the republic of Berne on a charge which did not come within the treaty. He appealed against his conviction, but the *Cour de Cassation* held that the two countries might have extended or modified the convention by subsequent agreements, according to the requirements and obligations of the friendly relations which subsisted between them; that the French tribunals were not called upon to inquire into the reasons which had determined the Republic of Berne, the sole guardian of its own independence and dignity, to grant the extradition; and that, whether it had been demanded or spontaneously accorded, the prisoner had been legally remitted to the jurisdiction of the law by which his crime was punishable: (Dalloz, *Jurisp. Gén.* 1841, I., 440.)" [BLACKBURN, J. also cited the following from the same book, p. 91: "Extradition can only be admitted with regard to a person accused of a crime other than the political crime, and not of a misdemeanor. It follows that if the extradition has been obtained of a person accused at once of a crime and a misdemeanor, he ought not to be put upon his trial for the misdemeanor." And again: "The order of extradition states the act upon which it is founded, and that act alone should be investigated." The *Attorney-General* pointed out that in this case the warrant of committal and the requisition only mentioned the two extradition crimes—forgery and fraudulent bankruptcy.] At all events, it does not sufficiently appear between such contradictory authorities what the French law is on the subject, and therefore extradition ought not to be granted under the present Act.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. I rather hesitate to express any decided opinion as to the construction to be put upon the 27th section, although I see plainly what was the intention of the Legislature—that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force. This has been probably effected, but is certainly not very clearly expressed. Nothing would have been more simple than to enact that, although it was expedient to repeal the statutes, yet that the treaties should still have full force and effect; instead of which this complicated and obscure language has been adopted. If it were necessary in the present

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case to decide that point, I should have been prepared to do so, and to declare that the object had been accomplished, though at the same time I should be disposed to advise the Government to make the matter safe by amending the Act, in case any question might hereafter arise upon it. Upon the second ground upon which we are asked to discharge the rule, I think there can be no real doubt. By sect. 3, sub-sect. 2, the statute is to have full force where provision is made by the law of the state demanding the extradition of the criminal, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. I consider that the requirements of this provision are satisfied. We are now clearly informed of the practical working of the French law by the affidavit of M. Moreau referring to the circular which is binding upon the courts of that country. It expressly provides that the criminal who is surrendered in respect of one offence will not be tried for another, until he has been restored or has had an opportunity of returning to Her Majesty's dominions. This view of the French law is confirmed by M. Felix, M. Blondel and other authors of the highest possible authority. I am satisfied that we must discharge the rule.

BLACKBURN, J.—I have no doubt that it was intended that the old treaties should still have force and effect, and that they should be enforced by the machinery provided under the Extradition Act, 1870. It was not intended to abrogate the old treaties, but I have very serious doubts whether the Legislature have effected by the 27th section what was intended. If it was necessary to decide that point, I should desire to take time to consider, but I content myself with saying that it seems desirable that there should be some further legislation upon the subject. But upon the other point I am of opinion that the requirements of sect. 3, sub-sect. 2, are complied with. The French law does provide that the fugitive criminal shall not be tried for an offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. When we read the affidavit of M. Moreau and the text books, this is made clear. The criminal ought therefore to be surrendered.

MELLOR, J.—I am inclined to agree with the construction of sect. 27 suggested by the Attorney-General; but I feel some doubt, and it would be advisable to set all doubt at rest by further legislation. Upon the other point I entirely agree with the judgments of my Lord and my brother Blackburn.

Rule discharged.

Attorney for the Crown, *The Solicitor to the Treasury.*

Attorneys for applicant, *Saunders and Hawksford, for F. Hawksford, Jersey.*

NORTHERN CIRCUIT.

MANCHESTER.

December 5, 1872.

(Before Mr. Justice LUSH.)

REG. v. MAYERS. (a)

Attempt to commit a rape on a woman asleep—Incapability to consent.

If a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape.

RICHARD MAYERS was indicted for having committed a rape on Sarah Ann Mayers, on the 12th of August, 1872, at Manchester.

Grimshaw was for the prosecution.

Taylor was for the defence.

The prosecutrix was sister-in-law of the prisoner, and they lived in the same house; the offence was alleged to have been committed at about eight o'clock on the morning of the 12th of August last, while she was asleep in her bed; her husband had gone to his work at seven o'clock that morning. She was then awake, but went to sleep again.

The prosecutrix gave the following evidence: "On the 12th of August, at 7 a.m., I got up to get my husband's breakfast, and went to bed again directly afterwards and fell asleep; the first thing after that which I remember was finding the prisoner in bed with me, he was agate of me when I awoke; I said nothing but turned away from him; I cannot say that he did it altogether; his person was to mine; I cannot say he did more, he was only a moment in that position; I got up immediately and went down stairs, and then I went to a neighbour's house and told her about it. Cross-examined: Prisoner has lived in the house two or three years; there has never been any attempt at familiarity before; I could not tell if he was drunk or sober."

(a) Reported by H. THURLOW, Barrister-at-Law

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The learned judge having said that there was no case of actual rape, but only of the attempt.

Grimshaw, for the prosecution, assented.

This closed the case for the prosecution, and no witnesses were called for the defence.

Taylor for the prisoner, now contended that there was no evidence of force or intent to use force, or that she resisted the prisoner, and therefore the prisoner could not be found guilty of the attempt.

LUSH, J.—Yes; but if she was asleep, she is incapable of consent, and therefore it would be a rape.

Taylor.—But there must be evidence that he used force; see *Reg. v. Stanton* (1 Carr. & Kir. 416), in which case the prisoner was indicted for an assault with intent to commit a rape, and Coleridge, J. said there must be some evidence of force; the words of the indictment are “violently and against her will.” Here there is no evidence of violence.

LUSH, J.—But if she was asleep it is against her will, and I shall rule that if he had, or attempted to have, connection with the woman while she was asleep he is guilty. Whether she was helpless or asleep it is the same.

Taylor then referred to *R. v. Barrow* (11 Cox C. C. 191; 38 L. J., M. C.).

LUSH, J.—But in *Barrow's case* she was not quite asleep, she was only half unconscious.

LUSH, J., to the jury: In this case there is no evidence of actual rape. You may, however, find the prisoner guilty of the attempt; for I shall lay down the law to you, that if a man gets into bed with a woman while she is asleep, and he knows she is asleep, and he has connection with her, or attempted to do so while in that state, he is guilty of rape in the one case and the attempt in the other. Therefore, what you must consider is this—did the prisoner come into the prosecutrix's room with the intention of having connection with her while she was asleep? If he did not have connection with her, but only attempted to do so, he is guilty of the attempt only. You must in this case take into consideration the circumstances of the case, for there is no doubt, although he had lived in the same house with her for two years, he had never attempted any familiarities with her before. Can you think, therefore, that he intended to have connection with her while she was awake? The question, therefore, for you is, did he get into that bed intending to have connection with her while she was asleep? If he did have connection with her while she was asleep he is guilty of rape; if he only attempted to do so he is guilty of the attempt.

Guilty.

NORTHERN CIRCUIT.

MANCHESTER.

December 7, 1872,

(Before Mr. Justice LUSH.)

REG. v. TURNER. (a)

Personation—Ballot Act, 35 & 36 Vict. c. 33, s. 24—Municipal election—Evidence—5 & 6 Will. 4, c. 76, s. 43.

It is not necessary to produce the charter of a city to prove that it is a municipal corporation; production of the minutes of the council at which the alderman was chosen for the ward is sufficient evidence, if it proves that the councillors of the ward were present on the occasion, and it is a sufficient compliance with sect. 43 of 5 & 6 Will. 4, c. 76.

DAVID TURNER was indicted for having wilfully, falsely, and feloniously applied for a ballot paper at the municipal election for the City of Manchester of the 1st of November.

Hopwood was for the prosecution.

Leresche was for the defence.

The prisoner was indicted under the 24th section of 35 & 36 Vict. c. 33 (the Ballot Act), which enacts that “a person shall for all purposes of the laws relating to parliamentary and municipal elections be deemed to be guilty of the offence of personation who, at an election for a county or borough, or at a municipal election, applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person; or who, having voted once at any such election, applies at the same election for a ballot paper in his own name.

“The offence of personation, or of aiding, abetting, counselling, or procuring the commission of the offence of personation, shall be a felony; and any person convicted thereof shall be punished by imprisonment for a term not exceeding two years with hard labour.”

The indictment was as follows:—

Lancashire, } The jurors of our Lady the Queen upon their
to wit. } oaths present, that heretofore, and at the
time of the committing of the felony hereinafter mentioned, the
city of Manchester, in the said county aforesaid, was a municipal

(a) Reported by H. Thurlow, Esq., Barrister-at-Law.

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borough, city and corporation, within the meaning of the Acts of Parliament relating to municipal cities, boroughs and corporations, and to municipal elections, and had been, and was duly divided for election and other purposes, into wards, to wit, fifteen named, called, and known as New Cross Ward, St. Michael's Ward, Collegiate Church Ward, St. Clement's Ward, Exchange Ward, Oxford Ward, St. James's Ward, St. John's Ward, St. Ann's Ward, All Saints' Ward, St. Luke's Ward, St. George's Ward, Medlock-street Ward, Ardwick Ward, and Cheetham Ward. And the jurors aforesaid, upon their oath aforesaid, do further present, that during all the time first aforesaid, at the city aforesaid, to wit, on the 1st day of November, 1872, a municipal election within the meaning of the Ballot Act, 1872, was proceeding and being held in due form of law, to wit, the election of a person to serve the office of councillor for the Ward of St. Clement's aforesaid, whereunto one George Anderson and one Edmund Asquith had been before then duly nominated, and were candidates, and the same was during all the time being held and proceeding at divers polling booths and stations, and among others at a polling booth and station numbered 5, before one John Nelson then and there acting as presiding officer at the said polling booth station, and during all the time aforesaid, the name of Henry Stocks appeared and was in and upon the register of voters, that is to say, the burgess and citizens roll of the said city and the ward, and the list of the said ward then in force, as a citizen having a right to vote at the said election; and thereupon at the city aforesaid, on the day and year aforesaid, at the municipal election aforesaid, David Turner wilfully, falsely, and feloniously did apply for a ballot paper at the said polling booth and station numbered 5, before the said John Nelson, in the name of some other person than himself, of the said David Turner, that is to say, in the name of the said Henry Stocks, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity. And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing of the felony hereinafter set forth, the city of Manchester, in the county aforesaid, was a municipal borough within the meaning of the Acts of Parliament relating to municipal corporations, and a municipal election of a person to serve the office of counsellor for a ward of the said city, that is to say, St. Clement's Ward, was being held, and thereupon David Turner, late of the city aforesaid, on the 1st day of November, 1872, at the city aforesaid, at and during the said municipal elections in and for the said St. Clement's Ward aforesaid, for a ballot paper in the name of a person other than himself, to wit, in the name of one Henry Stocks, then and there feloniously did apply, against the form of the said statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The circumstances of the case were as follows :—The municipal

election for the city of Manchester took place on the 1st of November, and the prisoner went on that day to one of the polling booths for St. Clement's Ward, and, after having stated that his name was Henry Stocks, of under 52, Boardman-street, applied for a ballot paper, which was given him, and which he placed in the ballot box. For the prosecution the following witnesses were called:—

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John Nelson said he was presiding officer at No. 5 polling booth in St. Clement's Ward on the 1st of November at the election for that ward. He saw prisoner come into the booth, and heard him say he was Henry Stocks, of under 52, Boardman-street. A voting paper was handed to him.

Samuel Gill said he was agent to Mr. Asquith, who was a candidate at the municipal election for the 1st of November. He was at No. 5 polling booth in St. Clement's Ward, and heard prisoner say he was Henry Stocks.

Ellen Stocks said she was the wife of Henry Stocks, and that on the 1st of November her husband was away in Staffordshire.

Sir Joseph Heron said he was the town clerk of Manchester, and he produced the burgess roll in which Henry Stocks appeared as occupier of 52, Boardman-street.

This was the case for the prosecution.

Leresche, for the prisoner, contended that it must be proved that Manchester was a municipal corporation; that there had been no proof of this; and that the charter of the city ought to have been produced.

LUSH, J., overruled the objection, as he said that it was in his judicial knowledge that Manchester was a municipal corporation.

Leresche then objected that under sect. 43 of 5 & 6 Will. 4, c. 76, it should have been proved that the election should have been held before the alderman whom the councillors chosen in such ward shall yearly appoint in that behalf. In this case it appeared that the alderman in question had been chosen by the council of the city, and not by the councillors.

In answer to this the town clerk produced the minutes of the council at which the choice of the alderman for the wards respectively was made, and that at that meeting the proper number of councillors for the ward in question were present.

Hopwood contended that the proof of the acting of the alderman as presiding officer was sufficient proof of due appointment, and cited *R. v. Thompson*, 2 Moo. & R. 355, and that the production of the minutes was sufficient proof of the appointment.

LUSH, J., after having consulted MELLOR, J., who was sitting in the other court, said that as it appeared by the minutes that the councillors of the ward were present on the occasion of the choice of the alderman, and that was a sufficient compliance with the requirements of sect. 43 of 5 & 6 Will. 4, c. 76.

Guilty. Sentence twelve months' hard labour.

CENTRAL CRIMINAL COURT.

December 16, 1872.

(Before Mr. Justice BRETT.)

REG. v. BUNN, RAY, JONES, WILSON, and DILLEY.(a)

*Conspiracy—Trades Union Act (34 & 35 Vict. c. 31); Criminal Law Amendment Act (34 & 35 Vict. c. 32).**An indictment for conspiracy at common law will lie against two or more persons for conspiring to commit an offence for which special provision is made by statute.**The defendants, servants of a gas company under contract of service, being offended by the dismissal of a fellow servant, agreed together to quit the service of their employers, without notice and in breach of their contracts of service, by reason of which the company were seriously impeded in the conduct of their business.**Being indicted for a conspiracy, it was contended that the stat. 34 & 35 Vict. c. 31, having determined that no act shall be illegal merely by reason of its being in restraint of trade, and having also defined the offence of "obstructing or molesting," and otherwise determined what shall be deemed to be offences as between masters and servants, had virtually declared all other acts not to be punishable.**But, held, that the provisions of the statute had not affected the common law of conspiracy, for which an indictment would lie.**The questions submitted to the jury were as follows:—**First. Did the defendants agree together to force the company against its will to employ a man it objected to employ?**Second. If so, was this sought to be done by improper threats or molestation?**Third. Molestation being anything done with improper intent, to the unjustifiable annoyance and interference with the master in the conduct of his business, and such as would be likely to have a deterring effect on a man of ordinary nerve,—was a quitting of the employ without notice, and breaking of the contract of service, to the undoubtedly serious injury of the master, a molestation within the above meaning of the term?*

(a) Reported by EDWD. T. E. BESLEY, Barrister-at-Law.

Fourth. Did the defendants agree together to force their employer to do what they desired by such a molestation?

Fifth. Did the defendants endeavour to enforce their object by simultaneously breaking their contracts of service?

A conspiracy may be to do an unlawful act, or to do a lawful act by unlawful means. If the jury deemed the object lawful, they would further say if the means employed were lawful or unlawful.

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JOHAN BUNN, George Ray, Edward Jones, Robert Wilson, and Thomas Dilley were indicted for a common law conspiracy against their masters, the Gaslight and Coke Company. The charge was variously stated in ten counts. The 1st, 2nd, 3rd, 4th, 5th, and 10th counts were as follows:—

Central Criminal Court) The jurors for our lady the Queen, upon
to wit.) their oath present, that heretofore
and at the time of committing the offence hereinafter charged, a certain public company called the Gas Light and Coke Company, carried on, used, and exercised the trade and business of manufacturers and vendors of gas, hiring and employing divers servants, workmen, and labourers, in their said trade and business, at wages mutually agreed upon between them the Gas Light and Coke Company and the said workmen and labourers, and that the said Gas Light and Coke Company had so hired and employed one Thomas Dilley, as such servant, and had lawfully, and for good and sufficient cause and reason, discharged the said Thomas Dilley from the service of the said company. And the jurors aforesaid, upon their oath aforesaid, do further present that John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, and the said Thomas Dilley, and divers other persons whose names to the jurors aforesaid are unknown, well knowing the premises, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to injure, prejudice, and annoy the said company, and to force and endeavour to force the said company to make alterations in their mode of conducting and carrying on their said trade and business on the 2nd day of December, in the year of our Lord, 1872, at the parish of Woolwich, in the county of Kent, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems and by divers threats and menaces, and other unlawful and wicked means and devices to obtain, extort, and procure of and from one George Careless Trewby, then being the superintendent of the Beckton works of the said Gas Light and Coke Company, and then being lawfully authorised to appoint and discharge the servants and workmen of the said company, the promise of him the said George Careless Trewby, contrary to his own free will to take back and reinstate in the service of the said company the said Thomas Dilley, to the great damage and injury

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of the said company, to the evil example of all others in the like case offending, and against the peace of our said lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid upon their oath aforesaid, do further present that the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, and Thomas Dilley, and divers other persons, whose names are unknown to the jurors aforesaid, well knowing the premises in the first count mentioned, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to injure, prejudice, and annoy the said Gas Light and Coke Company, and to force and endeavour to force the said company to make alterations in their mode of conducting and carrying on their said trade and business, afterwards, to wit, on the day and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, and by divers threats and menaces, and other unlawful and wicked means and devices, to obtain, procure, and compel the said company, contrary to their own free will and judgment, to reinstate the said Thomas Dilley, in the service of the said company, to the great injury, prejudice, and damage of the said Gas Light and Coke Company, to the evil example of all others in like case offending, and against the peace of our said lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that before and at the time of committing the offence hereinafter in this count mentioned, the said Gas Light and Coke Company carried on, used, and exercised, the trade and business of manufacturers and vendors of gas, and had hired and employed divers, to wit, five hundred servants, workmen, and labourers, to assist them in the said manufacture, at wages mutually agreed upon between the said Gas Light and Coke Company and the said servants, workmen, and labourers, under and by virtue of certain lawful contracts made between the said Gas Light and Coke Company and the said servants, workmen, and labourers, in that behalf, and had hired and employed the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, William Lenz, Edward Penn, Hermann Gers, John Sieper, and divers other servants, workmen, and labourers under the said contracts, and the said servants, workmen, and labourers had severally in and by the said contracts agreed not to leave the service of the said company without due notice of their intention so to do; and the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said contracts were subsisting and in full legal force and effect, to wit, on the day and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said Central Criminal Court, the said John Bunn, George Ray, Edward Jones,

Robert Wilson, Samuel Webb, James Clark, Thomas Dilley, and divers other persons whose names to the jurors aforesaid are unknown, well knowing the premises, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving and intending to injure, prejudice, and annoy the said company, and to hinder and prevent the said company from carrying on, using and exercising their said trade and business, unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, unlawfully to break the said contracts respectively; and that they, the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, William Lenz, Edward Penn, Hermann Gers, John Sieper, and the said other, servants, workmen, and labourers should depart from their said hiring and service, and that the said last-mentioned persons respectively should not give respectively to the said company any notice in pursuance of the said contracts respectively of their intention so to depart from their said hiring and employment, to the great damage and injury of the said company, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown, and dignity.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of committing the offence hereinafter charged divers public companies carried on, used and exercised the trade and business of manufacturers and vendors of gas, hiring and employing divers workmen and labourers in their said trade and business, at wages mutually agreed upon between them, the said companies, and the said workmen and labourers. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, before and at the time of committing the offence next hereinafter charged, divers public companies, to wit, the Gas Light and Coke Company, the Imperial Gas Company, the Independent Gas Company, the Commercial Gas Company, the Surrey Consumers' Gas Company, the Phoenix Gas Company, and divers other public companies carried on, used and exercised the said trade and business of manufacturers and vendors of gas as aforesaid, in divers parishes and places within the jurisdiction of the said Central Criminal Court; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, Thomas Dilley, and divers other persons whose names are unknown to the jurors aforesaid, well knowing the premises, and being evil disposed persons and unlawfully, wickedly, and unjustly devising, contriving, and intending to impoverish the said several public companies in this count mentioned and divers other public companies, manufacturers and vendors of gas, and each of them respectively on the day and in the year aforesaid, within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate and agree together amongst them-

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selves by divers unlawful ways, contrivances and stratagems, and by divers unlawful and wicked means and devices, to impoverish in their said trade and business of manufacturers and vendors of gas the said Gas Light and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the said Commercial Gas Company, the said Surrey Consumers' Gas Company, and the said Phoenix Gas Company, and divers other companies respectively then and there carrying on, using and exercising the said trade and business of manufacturers and vendors of gas as aforesaid, to the great damage of the said Gas Light and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the said Commercial Gas Company, the said Surrey Consumers' Gas Company, and the said Phoenix Gas Company, to the evil example of all others in the like case offending, and against the peace of our said lady the Queen, her crown and dignity.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said John Bunn, George Ray, Edward Jones, Robert Wilson, Samuel Webb, James Clark, Thomas Dilley, and divers other persons whose names are unknown to the jurors aforesaid, well knowing the premises in the fourth count mentioned, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to hinder and prevent the said public companies in the fourth count mentioned, and each of them respectively, from carrying on, using, and exercising their said trade and business of manufacturers and vendors of gas on the day and in the year aforesaid, within the jurisdiction of the said Central Criminal Court, unlawfully did conspire, combine, confederate, and agree together amongst themselves by divers unlawful ways, contrivances, and stratagems, and by divers unlawful and wicked means and devices, to prevent and hinder them, the said Gaslight and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the said Commercial Gas Company, the said Surrey Consumers' Gas Company, the said Phoenix Gas Company, and each of them respectively, from carrying on, using, and exercising their said trade and business so carried on, used, and exercised as aforesaid, to the great damage of the said Gaslight and Coke Company, the said Imperial Gas Company, the said Independent Gas Company, the said Commercial Gas Company, the said Surrey Consumers' Gas Company, and the said Phoenix Gas Company, to the evil example of all others in the like case offending, and against the peace of our said Lady the Queen, her crown and dignity.

Tenth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing the offence hereinafter in this count mentioned, the said Gas Light and Coke Company were possessed of certain buildings, gas holders, retorts, machinery, appliances, and materials, for manufacturing gas at Beckton, in the county of Kent, and within

the jurisdiction of the said Central Criminal Court, and were under certain Acts of Parliament legally bound to supply gas for the lighting of the public lamps in certain districts and places in the said Acts of Parliament mentioned, and were also in like manner bound to supply all the liege subjects of our said Lady the Queen with gas, within the said districts at all hours of the day and night. And the jurors aforesaid, upon their oaths aforesaid, do further present, that for the purpose of keeping up a constant and continuous supply of gas to the said public lamps, and to the said liege subjects of our said Lady the Queen it was necessary to employ a large number of servants, workmen, and labourers, to wit, five hundred servants, workmen, and labourers, to carry on continuously and without interruption the manufacture of the said gas, at the said works at Beckton, and that the work and labour of manufacturing gas was so continuously and without interruption carried on by means of about half of the number of the said servants, workmen, and labourers working in the said works by night, and about half of the number of the said servants, workmen, and labourers working in the said works by day. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said servants, workmen, and labourers were hired by the said company, and the said servants, workmen, and labourers entered the service of the said company upon an agreement and contract of service, that the said service should not be determined by the said company or by the said servants, workmen, and labourers respectively, without a previous notice of their intention respectively, so to determine the said service; the object of the said agreement and contract of service being that there should be no interruption in the carrying on the said manufacture of gas at the said works, by reason of any of the said servants, workmen, and labourers suddenly ceasing to perform their part of the said work and labour. And the jurors aforesaid, upon their oath aforesaid, do further present, that previous to the 2nd day of December, A.D. 1872, the said continuous manufacture of gas had been and was being carried on at the said works as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that on the said 2nd day of December, A.D. 1872, at Beckton aforesaid, and within the jurisdiction of the said Central Criminal Court, John Bunn, George Ray, Edward Jones, Robert Wilson, James Clark, and Thomas Dilley, well-knowing the premises, and being servants, workmen, and labourers as aforesaid, under contracts of service as aforesaid, and which said contracts of service with the said company as aforesaid had not been determined by previous notice as aforesaid, wilfully, designedly, and unlawfully did conspire, combine, confederate, and agree together, and with divers others whose names are to the jurors unknown, themselves to commit a breach of the said contract of service, and by divers threatening notices, exhortations, persuasions, falsehoods, stratagems and devices to procure, induce, and constrain the other servants, workmen, and

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labourers, whether working on the said works by night or by day, against their own free will and good judgment also to commit a breach of the said contract of service at one and the same time ; that is to say, to refuse to do the necessary work and labour required to be done as aforesaid, for the purpose of manufacturing and supplying gas without interruption as aforesaid, and to leave the said works of the said company suddenly, simultaneously, and without notice, to the great injury of the said company, and of the said liege subjects of our Lady the Queen, and of the said servants, workmen, and labourers of the said company, who were otherwise ready and willing to continue their said contract of service, and against the peace of our said Lady the Queen, her crown and dignity.

The sixth, seventh, eighth, and ninth counts were for molesting, intimidating, and forcing William Lenz and others to leave the service of the Gas Company, and were given up by the prosecution upon the suggestion of the learned judge in the course of the trial.

Hardinge Giffard, Q.C., and *Besley* (instructed by *Humphreys* and *Morgan*) for the prosecution.

Straight and *Humphreys* for Bunn and Dilley; *Montague Williams* for Ray, Jones, and Wilson (instructed by *Shaen*, *Roscoe*, and *Massey*).

Giffard, in opening the case, cited *R. v. Druitt, Lawrence, Adamson, and others* (10 Cox C. C. 600), and read the words of Bramwell, B., there reported :—" When the law gave, or rather acknowledged, a right, it provided a punishment or a remedy for the violation of that right. That was a cardinal rule, and an obvious one. The old expression that ' there was no wrong without a remedy,' might also be interpreted to mean that there was also no right without a remedy. Sometimes the remedy was by a criminal proceeding, sometimes by a civil action, sometimes by both. Having made those general remarks, he would make another, which was also familiar to all Englishmen—namely, that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. They were quite aware of the pains taken by the common law, by the writ, as it was called, of *habeas corpus*, and supplemented by statute, to secure to every man his personal freedom—that he should not be put in prison without lawful cause, and that if he was, he should be brought before a competent magistrate within a given time and be set at liberty or undergo punishment. But that liberty was not liberty of the body only. It was also a liberty of the mind and will ; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of

the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves." He also cited *R. v. Duffield* (5 Cox C. C. 406), and read the words of Erle, C. J.:—"The indictment charges in one class of the counts, and that to which I think your attention should be most prominently directed, that they conspired to obstruct Mr. Perry in the carrying out of his business, by persuading and inducing workmen, that had been hired by him, to leave his service in order to force him to change the mode of carrying on his business. There are no threats or intimidations supposed to have been used towards the workmen, but there is a class of counts founded upon that, and I take it to be perfectly clear in point of law, and I lay it down to you for the purpose of your verdict, that if that class of counts is made out you will find the defendants guilty upon that class of counts, that they conspired to obstruct Mr. Perry by persuading his workmen to leave him."

The following is an epitome of the evidence then given for the Crown.

George Careless Trewby (examined by *Besley*), said: I am the superintendent of the Gas Light and Coke Company at Beckton Station. It is our largest place for the manufacture of gas. We supply the whole of the city with gas, and part of the West-end. The storage of gas at Beckton is limited. It is therefore necessary the manufacture should go on night and day. For that purpose we employ about five hundred workmen and divide them into two gangs. They are employed in the retort houses where the fires are attended to. The night gang go to work about six o'clock in the evening and work till half-past five the following morning. They are at actual work about five hours. The day gang go on some at six, some at half-past, and others at seven, for the different processes. With some of the work-people I had written and signed contracts. Those that had not contracts were under an engagement for a week's notice. An advertisement was posted up to that effect at the pay office. A matter was reported to me about the 22nd of November with respect to Dilley. He was then a servant. I gave directions for his discharge. I heard nothing further until the 2nd of December. Collier, a foreman on the works, came to me. It was a quarter to seven in the morning. In consequence of what he told me I went to one of the retort houses. I there saw the night and day gangs. In the ordinary course of things the night gang should have left at six o'clock. Before the men commence work they change their clothes. None of the day gang had changed their clothes. When I got there I asked the men what they wanted to see me

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about. I noticed Jones and Wilson, two of the defendants, standing close to me. I also noticed Webb. The men said they wanted to see me about Dilley's case. Webb was the first spokesman; and I called for the day gang because it was their duty to have gone to work. Jones said they were all there. I said, "Why don't you go to your work?" He said, "We have decided not to go until Dilley is reinstated." Wilson spoke to the same effect. Webb spoke also in the same strain. As he belonged to the night gang he should have left the works. I then said, "It is past the time the whole of you should have gone to your work; the company have always behaved liberally towards you; they have conceded all you have asked from time to time. I call on all those who are well disposed to them to go to their work." Not a man separated from the rest. I said both to Jones and Wilson, "Am I to understand that you refuse to go on with your work until Dilley is reinstated?" They said, "Yes." They said "Dilley's and the Fulham question had been put into one." I said, "I had nothing to do with affairs at Fulham;" and I then left them.

By BRETT, J.—I spoke loud enough for all the men to hear. They did not move.

Examination continued.—I said I should leave them for a short time for consideration. I remained away ten minutes. I then went back. There was something said about the men acting under their delegates. I asked for Bunn and Ray. I said to them, "Am I to understand that you refuse to go on with your work until Dilley is reinstated?" They said, "Yes." I said, "You are acting illegally; some are under a monthly and some under a weekly agreement, and you can't leave without giving proper notice." I said, "I will give you ten minutes more to consider." Jones said, "We have made up our minds." I then went away, and returned in about ten minutes. They then said they were of the same opinion.

By BRETT, J.—Jones, Bunn, and Ray were there, I won't be sure as to Wilson; Webb was there also. Jones said the men were of the same opinion. I said, "Very well, then; I will reinstate Dilley, but I do so under protest; now go on with your work." Webb said, "They don't understand what you mean by protest." I said, "Do you." He said, "Yes." I said, "Perhaps you will explain it to them." He said, "The governor means to punish you." He said, "Will you withdraw that word." I said, "How can I? You insist on Dilley's being reinstated, and I reinstate him, but under protest." Webb said, "We may as well tell you we can't go on with our work until the men at Fulham are let in." I said, "That is a matter with which I have nothing to do." The men said, "They could not go to work until they had received orders from their delegate meeting;" that was said by Webb. The night and day hands walked off in a body. I saw Dilley there at the time. These four men belonged to the day gang. Dilley had been discharged. I noticed a placard on the lobby door. Some

of the men would have to go there to change their clothes. We have four lobbies. This was where the meeting took place with the men.

Besley.—We propose to read the placard.

M. Williams objected. There is nothing to show that these men ever saw it or that they could read or write.

Examination continued.—I signed on behalf of the Company, these four agreements (produced) I find the signatures of three of the defendants there, Bunn, Ray, and Jones.

Williams.—It does not bring it any closer.

BRETT, J.—It gets rid of the one point—if a man can write, he can also read.

Williams.—I submit there is still the other point.

BRETT, J.—Have you any objection?

Straight.—The only objection is, that knowledge must be brought home to the defendants if they are to be criminally responsible.

Giffard.—I submit it is evidence; it was a direction to the men to do something.

BRETT, J.—That is assuming what is in it. How do you charge these men? Is it a charge of conspiracy between these men and others to the jurors unknown?

Giffard.—Yes. It does not require that the particular thing should have been done by any one of these men.

BRETT, J.—What do you say, Mr. Straight, to the rule that in indictments for conspiracy, if evidence is given of a conspiracy affecting the defendants, then everything done by any party to that conspiracy is evidence against them.

Straight.—But there must be evidence to show that the act was done by some party to the conspiracy.

BRETT, J.—Is there not that evidence? Is there no evidence to show this was put up by some of the gang of workmen?

Straight.—I should venture to say there is no evidence.

BRETT, J.—Who else could have put it up?

Straight.—That I am not called on to answer.

BRETT, J.—If you can't suggest anyone else, it is obvious it must be some of them.

Straight.—It may be a stranger put them up.

BRETT, J.—That is an answer to the evidence, but is it not more probable that the workpeople were all acting together. I admit the evidence on the grounds I have stated, namely, that there is evidence of a conspiracy.

The notice was put in and read, and was as follows:—

“Notice.—All men that belong to the Society of Beckton station, working to-night, are bound to answer to their names at six o'clock, a.m., this morning, December 2nd, 1872; by order of the General Council. Those absenting themselves after this notice must abide by the consequences.”

Examination continued.—That was no notice of mine. My attention was drawn to it that morning.

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Cross-examination.—This is a monthly agreement (agreement handed in and read as follows) :—

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AN AGREEMENT made this 14th day of November, 1871, between (stoker), of the one part, and The Gas Light and Coke Company, by G. O. Trewby, their agent, of the other part, as follows.

The said company agree to take the said into their employment, at his request, upon the following terms and conditions :

1. The said shall continue in the service of the company for one calendar month, to be reckoned from the day of the date hereof, and after the expiration thereof for such further period until the service shall be put an end to by either of the parties hereto giving to the other one calendar month's previous notice in writing of such their intention.

2. The said shall observe and conform to all the rules and regulations of the company, which from time to time are posted on the premises of the company for the information of the persons in their employ.

3. The said shall faithfully work for and serve the company to the best of his skill and power wherever his services be required, and in whichever of the following classes or capacities the company may from time to time require, and at the rate of pay or wages specified for each class and description of work at the foot hereof, or such other piece work as shall be from time to time mutually agreed on.

4. If the said shall leave his employment, or absent himself from his work, without giving the aforesaid previous notice, all pay which may then be due to him shall be absolutely forfeited to the company.

5. The company shall be at liberty to discharge him at any time without previous notice; but in that case (unless in the cases after mentioned) he shall be entitled to one month's pay, at the same rate as shall have been paid to him immediately previous to such discharge; but if his discharge shall be on account of drunkenness, neglect of work, or other misconduct, he shall not be entitled to receive more than the amount of wages which may be due to him up to the time of his dismissal.

6. It is lastly mutually declared, that nothing herein contained shall be construed to exempt the said from being liable to the laws now or hereafter in force for the regulations of masters and servants.

As witness the hands of the said parties
Witness, W. COLLIER.

G. O. TREWBY.

1ST CLASS STOKERS.	2ND CLASS STOKERS.	3RD CLASS STOKERS.	COKE SPREADERS.	LABOURERS.
Per Week of 7 Days 86s. 6d.	Per Week of 7 Days 86s.	Per Week of 7 Days 84s.	Per Week of 7 Days 29s.	Per Day 8s. 6d.
PIECE WORK.				
Filling Common Coal into Buckets from Ship, per Ton 2½d.	Filling Cannel Coal into Buckets from Ship, per Ton 4d.		Loading Coke into Waggons or Carts, per Chaldron 6d.	Unloading Lime from Barge into Trucks, per Yard 5d.

The men had to discharge the duties included in that agreement. These agreements have been in use since 1871. In 1871, Bunn was employed in the retort house. He would be a stoker. Labourers would be liable to stoker work if they could do it. It was the practice at the works to a certain extent. Dilley was in the service about eighteen months. All that I have told you about took place on the 2nd of December. The whole affair took about three-quarters of an hour. There were no threats used. I reinstated Dilley because I was anxious to

get the work done. Dilley was what is called a pipe jumper. It is included in the third class pay. He would have been liable for other work. Pipe jumping is keeping the ascension pipe from the retorts clear. The rates of wages have been altered since the agreement. Dilley would work day or night, according to the gang in which he was. The men are paid on the increased rate.

BRETT, J.—I trust these questions are material.

Straight.—I am putting these questions because, so far as I can gather from the indictment, they allege there were contracts between the men at the bar and the gas company, which would bring them under the terms of the Master and Servant Act, and what I am going to submit to you is that these persons do not come within the terms of that Act of Parliament.

Cross-examination continued.—A person who had signed these agreements was never dismissed for the day. I am aware Dilley left his employment on the 31st of November. The men wear different clothes at their work. They left them at the works in their lockers. Each man has a locker.

Cross-examination by Mr. Williams.—Ray, I believe, was a pipe jumper; Jones was a second class; Wilson, he was either first or second class. It appears Wilson cannot write.

BRETT, J.—Wilson's agreement is signed with a mark.

Williams.—Yes, my lord.

Cross-examination continued.—These agreements were read to the men by Collier, the foreman. When I first went to the men about five hundred were assembled. I addressed them as a body. I heard no bad language or threats.

William Collier said.—I am foreman to the carbonizing department of the Beckton Gas Works. I was witness to the signature of those four men. Wilson is a marksman.

Cross-examined.—The men had the opportunity of reading the agreements over. I cannot say the agreement was read over to these individual men.

Samuel Leonard.—I was foreman of stokers. On the morning of December 2nd, when I got to the works, I found a great number of men there. They were standing by the retort house. In consequence of some observations, I went and fetched Mr. Trewby, the Manager. On the 22nd of November I ordered Dilley to do some work. He refused to do it. He said, "It is against the rules of my society."

Cross-examined.—I have known Dilley since he has been in the service. He always before discharged his duty properly. He was a hard working man. He had left on the 2nd December. He had been doing different work, not always the same. Bunn was under my control. Dilley told me he came from the Imperial Gas Company at Battle Bridge. Bunn was a good workman.

Thomas Taylor.—I was in the service of the gas company. I was a member of the Amalgamated Gas Stokers' Society. Dilley

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represents the place where he is employed at that Society. Jones was also a delegate. Wilson was substituted in his place in consequence of some discussion between the men. I struck with the rest of the men. Until I got there that morning I had no intention of striking.

Cross-examined.—I was cross-examined before the magistrates. The Society of which I speak has been in existence some four or five months.

Re-examined.—When we left the works we went to a public house in the Barking Road. We expected to be sent for by Mr. Trewby to go to work again.

To *Straight*.—Bunn was not a delegate. Dilley had been one, but I can't say whether he was after his discharge.

To BRETT, J.—The delegates are elected by the workmen at the works. They attend the meetings of the society.

Thomas Roffey.—I was employed at the gas works, and was a member of the Amalgamated Gas Stokers' Society. I was compelled to be a member by the workmen. On the 2nd of December, when I was at work, I saw the defendants there. Dilley told me if I did not go with the men I should be spotted. I had no intention of leaving the works. I went with the mob to Barking. I heard something said about telegrams there. The telegram was to come from London

Edward Penn.—I was in the employ of the gas company at Beckton. I went as usual to my work on the 2nd of December. I saw Dilley there. I told him I was going to work. He told me to put my clothes on, or else put up with the consequences.

Cross-examined.—I was examined at Woolwich before a magistrate.

Frederick Byes.—I am a gas-stoker. I went to work on the 2nd of December. I saw Bunn there. He said there was no work to-day. I went to Barking. I saw Jones and Ray there. I had no idea of any strike until I got to the works.

Cross-examined.—I am a member of the union.

William Lenz.—I am a German, and was working at Beckton Gas Works. I was on the day gang. I was told by Dilley to go to the meeting with the others. I said that is nothing to do with me. Dilley said, "Bloody German."

John Sieper.—I was in the employ of the gas company. On the morning of the 2nd of December I went to my work. I was told to go to the meeting. I was frightened to go to work.

Cross-examined.—I was a stoker. All that Dilley said to me was, "Go to the meeting."

Frederick Alexander McMeun.—I am sub-engineer to the Imperial Gaslight and Coke Company at their station at Fulham. On the 28th of November there was a man discharged, in consequence of which there was a strike.

Straight directed his Lordship's attention, first, to the form of the indictment, and, secondly, whether there was sufficient evi-

dence to bring the defendants or any of them within the terms of any of its ten counts, in which the offences charged were more or less varied. It must be assumed that a combination between workmen for the purpose of raising their wages was, both before, and at the time of, the passing of the Master and Servants Act, in 1867, perfectly legal, that Act only extending the operation of a variety of statutes, commencing with the 20 Geo. 2, c. 119—all these earlier Acts rendered certain persons therein specified capable of entering into contracts to which certain penalties and liabilities were attached, and which obligations were not incidental to the ordinary contract of hiring between master and servant. The relation between masters and servants, prior to the Act of 1871, the Trades Union Act, and the Criminal Law Amendment Act, has never yet been defined by statute. The present indictment, which is one at common law, charges in its first two counts a combination and conspiracy on the part of the several defendants, with an intent on their part to injure, annoy, and prejudice, and to force and endeavour to force the Gas Company to make alterations in their mode of conducting and carrying on their trade and business by divers unlawful ways, contrivances, and stratagems, and by divers threats and menaces to obtain, extort, and procure from George Trewby a promise contrary to his (Trewby's) own free will, that he would restore Dilley. Since, however, the well known case of the tailors tried by Mr. Baron Bramwell (*Reg. v. Druitt and others*, 10 Cox C. C. 600), where existing law was correctly expounded, viz., in 1871, which may be almost said to go together, the Trades Union Act, and the Criminal Law Amendment Act, have been passed, by which the Legislature, having regard to the relations subsisting between masters and men, has created certain criminal offences. This would seem to abrogate any common law right to create offences which may, and probably must, at the time these statutes were passed, have been in the contemplation of the Legislature. The 34 & 35 Vict. c. 31, s. 2, says, "The purposes of any Trade Union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such Trade Union liable to a criminal prosecution for conspiracy or otherwise." And sect. 3 says, "The purposes of any Trade Union shall not by reason merely that they are in restraint of trade be unlawful so as to render void or voidable any agreement or trust." The Act of Parliament was passed mainly in consequence of the case of *Farrar v. Close*, in the Queen's Bench, where the judges differed, the Lord Chief Justice and Mr. Justice Mellor holding one view, and Mr. Justice Hannen and Mr. Justice Hayes an opposite one, and on account of complaints made that Trades Unions legitimately formed for the legitimate purpose of promoting the fair interests of their trade, were not capable of prosecuting persons who embezzled their funds. By that Act, the old doctrine that combinations between workmen in restraint of trade were illegal,

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was abolished, and it was enacted that Trades Unions and Societies of workmen for the purpose of doing something that might restrain trade might be formed without being illegal. The definition in the Trades Union Act, of what was to be a Trade Union is as follows: "The term Trade Union means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workman and workman, or between masters and masters; or for imposing restrictive conditions upon the conduct of any trade or business as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of any one or more of those purposes being in restraint of trade, provided that this Act shall not affect "1. Any agreement between partners as to their own business; 2. Any agreement between an employer and those employed by him as to such employment; 3. Any agreement in consideration of the sale of the good will of a business, or of instruction in any profession, trade, or handicraft." Therefore, since the Act has been passed, it is perfectly legitimate for a body of men to form such a combination, although the object of their associating together may be to do something that will result in the restraint of trade. The 34 & 35 Vict. c. 32 (Criminal Law Amendment Act) the object of passing which was that when the Legislature was permitting a combination of the character and description such as that which is mentioned in the Trades' Union Act, it was necessary that every precaution should be thrown round the persons engaged in those combinations, in order to protect the members of those combinations on the one hand and the masters on the other, plainly and distinctly shows what the offences are of which these persons could be guilty. Under these circumstances, the Legislature in 1871 has taken a review of all the offences that would be likely to be committed in reference to these combinations, and by the Act of Parliament then passed we are bound. If a conspiracy can be a conspiracy that is indictable at all, it must be a conspiracy to do something in reference to this particular Act of Parliament, and must be guided by evidence such as would be required upon this particular Act of Parliament. In the 1st section of the Act, which is somewhat difficult of construction, it says, "Any person who shall do any one or more of the following Acts, that is to say: (1) use violence to any person. (2) Threaten or intimidate any person in such a manner as would justify a justice of the peace, upon complaint made to him to bind over the person, so threatening or intimidating, to keep the peace. (3) Molest or obstruct any person in the manner defined by this section." Therefore, passing over the first two heads, which have no reference to the present case (as they do not seem to operate at all), the question is—if this statute has created the offences by workmen against their masters and no offences, other than defined by the statute, can be charged against them, is there any evidence here to show a molestation, or obstruction, or a conspiracy to molest or obstruct,

in the terms, and according to the meaning, of this Act of Parliament? It must be borne in mind that such must always be done with a view to cause the person, who is a master, to dismiss or cease to employ any workman, or being a workman to quit any employment, "or return work before it is finished," "being a master, not to offer or being a workman, not to accept any employment or work; being a master or workman, to belong or not to belong to any temporary or permanent association or combination; being a master or workman, to pay any fine or penalty imposed by any association or combination; being a master, to alter the mode of carrying on his business or the number or description of persons employed by him." The section goes on to say that a person so offending shall be liable to imprisonment with hard labour for any term not exceeding three months. But this is, if he shall molest or obstruct any master, for example, or any man, for the purpose of coercing him to do any of the things mentioned. Then it goes on to say, "A person for the purposes of this Act shall be deemed to molest or obstruct another person in any of the following cases, that is to say, if he persistently follow such persons about from place to place; if he hide any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof; if he watch or beset the house or place where such person resides or works, or carries on business or happens to be, or the approach to such house or place, or if with two or more other persons he follows such person in a disorderly manner in or through any street or road." The "molesting or obstructing" must partake, as far as the facts in support are concerned, of the three matters I have mentioned. Then the Act goes on to say, that nothing in this section shall prevent any person from being liable under any other Act or otherwise to any higher punishment than is provided by this section, so that no person be punished twice for the same offence, provided that no person shall be liable to any punishment for doing or conspiring to do any act, on the ground that such act restrains or tends to restrain the free course of trade, unless that act is one of the acts herein before specified in this section, and is done with the object of coercing as before mentioned. It is clear, therefore, that in 1871 the Legislature was passing a statute regulating all the relations between masters and servants; and by those provisions they practically say that there shall be no other offence as between master and servant but the offences detailed in the preceding part of this section. [BRETT, J.—Does it; where does it say that?] The words I have just read bear that construction. [BRETT, J.—What is the rule of construction as applicable to the present case? If these statutes create an offence, then in order to make out the offence you must bring it within the statute. But if there were offences at common law, are those offences done away with by these statutes? Unless you can find words that say that the only offences shall be those within these statutes, that would not be so,

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would it?] The words are “unless such act is one of the acts hereinbefore specified.” If it was not intended to do away with all conspiracies by servants against their masters, and *vice versâ*, except those mentioned in the Act, it puts both the workman and the master in a worse position than he was before this Act of Parliament passed, because the Act was specially passed to ascertain and define the criminal responsibilities as between master and servant. I contend that it destroys all preceding or hitherto existing offences; in other words, it consolidates the whole law as it shall and ought to exist. [BRETT, J.—You must put your proposition in terms, that all conspiracies between servants as against their masters with regard to those relations, or all conspiracies by masters as against their servants, which were illegal before are legal now, unless they are forbidden by that statute.] That, my lord, is exactly the position I am contending for and take up. Referring to the particular form of the indictment, I say that the counts are bad, as they ought to have the relation of an offence, and ought to have followed the terms of the Act of Parliament. [BRETT, J.—You are applying to quash the indictment. To do so you must make out two propositions; first, that the counts are bad; and secondly, if they are, that this is the right time to quash them.] I may at any time take objection to the form of the indictment. There is the further proposition, that in respect to some of the counts there is no evidence to go the jury. I refer to the first count, and to the second, which practically repeats it: (read first and second counts.) [BRETT, J.—First of all, what do you say as to whether this is a good conspiracy (if it is made out, of course), at common law before the statute?] I am inclined to think it was prior to the statute, as it would be an unlawful combination between these parties, by threats and menaces, to induce some person, who was in a position to do a certain thing, to do that certain thing. [BRETT, J.—Not merely on the ground that it was in restraint of trade, because it might be without threats and menaces—not merely on that ground, but because it is an attempt to interfere with the liberty of the man’s will in the conduct of his trade, by menaces and threats. These grounds are not touched by the Trades Union Act. Let us see whether such a conspiracy, good at common law, is or is not within this statute.] I should say it is within the statute; but in order to support it, that is, as to the requisite proof, it would come under the third head of the early portion of the section, viz., “molesting or obstructing in order to induce or coerce the master to do something specified in the Act,” and there ought to be proof that there was such a “molestation or obstruction” as was contemplated by the Act of Parliament. [BRETT, J.—Molestation or obstruction by “one” workman is now made an offence. It was not so before this statute.] Yes; there is a provision at the end of the section with reference to what matter an indictment for conspiracy may be preferred. [BRETT, J.—“Conspiring to do an act on the

ground that such act *restrains or tends to restrain the free course of trade.*" What you have to meet is this: The prosecution will say, this is not a conspiracy charged upon the ground that it was an act which tends to restrain the free course of trade, but it is a conspiracy *founded upon an interference with a person's free will, by threats and intimidations.*] All this must of necessity have been taken into consideration at the time the Act passed, and if the Legislature had intended to give any force to the latter contention, they would have done so, knowing the unwillingness there is on the part of the judges to allow indictments at common law to be preferred. As they have not done so, it must be presumed that no such offence exists. The same remarks apply to the second count of the indictment. Next, as to the third count. Where one has to consider the contracts which were entered into between the company and the various persons employed by them, it runs as follows: "And the said workmen and labourers under and by virtue of certain lawful contracts made between the said Gas Light and Coke Company and the said servants, workmen, and labourers in that behalf, and had hired and employed the said John Bunn, and others," setting out the various persons "as workmen and labourers under the said contracts, and the said servants, workmen, and labourers had severally in and by the said contracts agreed not to leave the service of the said company without due notice of their intention of doing so," then it goes on to allege that they "devising to injure, prejudice, and annoy the said company, and to hinder and prevent the said company from carrying on, using, and exercising their said trade and business, unlawfully did conspire, combine, confederate, and agree together amongst themselves by divers unlawful ways, contrivances, and stratagems, unlawfully to break the said contracts respectively, and that they and others, servants, workmen, and labourers, should depart from their said service and hiring, and should not give respectively to the said company any notice in pursuance of the said contracts respectively of their intention so to depart from their said hiring and employment." The meaning of this count is that these parties conspired among themselves, they being parties bound by a legal contract created by statute, both themselves to leave the employment without proper notice, and to induce others also in the same employment to do so as well. [BRETT, J.—Not simply to leave the employ, but, after having entered into contracts binding upon them according to law, and so binding that if they break them they are liable to criminal punishment, they conspire and agree together that these persons should break their contracts made according to the law, and, according to the criminal law, for the purpose of interfering with their masters.] Just so, that is what I was anxious to put as my proposition. The main point one has to consider at the outset of the count is, Were these persons within the Act of Parliament? [BRETT, J.—That goes to a question of whether there is any evidence upon this count for the purpose of

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quashing it, or saying it is a bad count; you must assume that the contract is what it is stated to be.] I say, the whole indictment should be quashed, as substantially what is stated in the first count is repeated in the other counts; the same remarks apply to each of them. [BRETT, J.—Do you maintain your proposition that this third count is bad on the face of it?] No, only that there is no evidence to go to the jury upon it. I have no complaint, in point of law, to make upon any other counts. [BRETT, J.—Now return to your first count. Supposing that is a good count, what do you say about the evidence?] As regards that I can scarcely, I think, ask you to say that there is not some evidence to go to the jury; but as to the third count, I say that there is no evidence to go to the jury on that count, because, alleging, as it does, that a contract has been entered into between the company and these various persons—— [BRETT, J.—As I understand you, your first point is that there is no evidence of a contract, for the breach of which a workman might be summarily convicted. Why not?] Because the defendants do not come within the terms of any of the Acts of Parliament relating to masters and servants which gives that criminal remedy to the master. The words of the 30th and 31st of Victoria are as follows: “In this Act the following words and expressions shall have the several meanings assigned to them unless there is anything in the context repugnant to such construction: the word “*Employed*,” reading it as it is here, no doubt, very broad, ‘shall include any servant, artificer, labourer, apprentice, or other person, whether under the age of twenty-one or above that age, who has entered into a contract of service with any employer.’” If that stood by itself, it would be all very well, but on turning to the third section I find that we are relegated back to all the old statutes as to what “*employ*” means. The words are: “Nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments described in the first schedule to this Act.” And in that first schedule are included all the various Acts of Parliament that have regulated the relations between masters and servants. It goes on—“Or some or one of them, or to any *employer* or *employed*, other than the parties to a contract of service to which this Act applies as aforesaid, or to any case, matter, or *thing* arising under or relating to any contract of service or arising between employer and employed other than cases, matters, and things to which the said enactments respectively apply; and in respect of all contracts of service, employers, employed, cases, matters, and things to which this Act applies, the respective provisions of this Act shall be deemed to be, and are hereby substituted for such of the said enactments, or so much or such parts of the same as would have applied thereto if this Act had not been passed; but any proceedings at the passing of this Act pending under the said enactments, or any of them, may be continued and prosecuted as if this Act had not been passed.” Take, for example, the term “labourer” in

the old Act: that means a labourer in its direct immediate sense, namely, a labourer in the field. [BRETT, J.—Under this Act the expression “employed” is defined, and when you come to what “contract” means, that is also defined. It is to be such a contract as is contained in the former statute.] I have had no opportunity of looking through all the statutes; it certainly does appear so at the first glance. [BRETT, J.—The same definitions would apply to the second count.] Yes; and perhaps to the third. [BRETT, J.—You admit that if this is a contract within the statute, if this is a contract for the breach of which there might be a summary conviction, there is evidence to go to the jury of a conspiracy to molest the master, or to control his free will in his trade by means of breaking, criminally breaking, these contracts.] I could not say that it is not a question for the jury. [BRETT, J.—I say then that there is evidence to go to the jury.]

Montague Williams.—I submit there is no evidence to go to the jury of any conspiracy, upon the ground that if the defendants were punishable at all, they were punishable singly as individuals under the Masters and Servants Act, there being no evidence as it stands at present of such a combination between these parties as to constitute a conspiracy. The evidence at present, on the part of the Crown, is this, that when the defendants went on Monday morning there was no intention on their part, nor were they aware of any intention, either to leave work or quit their employment. The mere fact of five hundred men standing together, without any previous concert, or without any evidence of previous concert, and three men saying “I don’t intend to work,” would not be sufficient evidence to constitute a conspiracy. [BRETT, J.—If they agree together, even at the last moment, that would be a conspiracy.] There is no evidence to go to the jury of any such agreement. The mere fact of certain members of the gang (say five hundred if you like) when addressed, saying one after the other, “I don’t intend to work,” unless there is evidence of previous concert, cannot be evidence of such a conspiracy as would be punishable by the Criminal Law, or in point of fact of any conspiracy whatever. [BRETT, J.—Do you mean, that there was no agreement, if five hundred persons, all in the same position, with regard to their masters, upon the allegation of some fact which concerns each of them both individually and collectively, leave the employment at the same moment? Do you think that is a fortuitous case of individual free will all round, that the same idea struck them all at the same moment individually? Do you mean that there must be evidence of some positive arrangement? Is not an agreement to be inferred from the acts of persons without any evidence of any positive agreement?] Could it be said during the recent police strike, that the fact of a number of policemen being at the police station, and one and all at the same moment saying, without any previous consent, that they would not go out on duty, would be a conspiracy. [BRETT, J.—No. I don’t say it would, I ask

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you.] The present case appears to me to be much the same thing. [BRETT, J.—Is there not something more here than the mere fact of five hundred men all leaving at the same moment? Are there not expressions used by some of them, and by some of the defendants, which seem to go further than that?] Singly, no doubt, they would be liable under the Masters and Servants Act, to be dealt with summarily. I do not dispute that, but there is no sufficient evidence of combination as would make them responsible to a criminal indictment for conspiracy.

Giffard, Q.C.—As to the two first counts being bad, I take it that the meaning of the two statutes quoted is (what the language of the sections themselves express) that where an Act is alleged, simply from the fact that it tends to restrain trade, to be unlawful, then the argument put forward might or might not be well founded. I don't say there is, but there might be, a colour for such an argument from the fact that there is a proviso with reference to a charge of conspiracy in restraint of trade in the Act. The fallacy arises from confusing what is in restraint of trade with that which is in restraint of trade and in restraint of something else as well, viz., in restraint of personal free will. This indictment does not rest upon any principle that it is unlawful to restrain trade, but it rests upon the principle that it is unlawful to coerce a man's will by threats. Neither of the Acts quoted touch that point. The allegation here is that they conspired, "contrary to the free will of Mr. Trewby," to force and extort from him a promise that he would do something that he did not wish to do, that they conspired to do that, and that the mode by which that conspiracy was to be carried out was by intimidation. [BRETT, J.—So far as the count on the face of it goes, it may be said that it is within this section, because it is by threats and menaces, and the section says, "whoever shall threaten or intimidate any person." It may be that on the face of this indictment it goes that length.] No doubt, but I submit that threats and intimidation, do not, either under the statute, or at common law, necessarily mean threats of personal violence. [BRETT, J.—They do in this section. It says, "such threats and intimidations as would justify a justice of the peace doing so and so;" and on the face of the indictment it might be said that the threats and menaces there set out were the threats and menaces as contemplated by the statute.] The gist of this indictment in these counts is not at all the offence being in restraint of trade. The Act of Parliament does not apply to the present case, as no part of it contemplates a repeal of the Common Law. Suppose this had been a conspiracy to cut off the gas pipes, could it be said, if these men were to conspire that all of them should cut off the gas pipes and tell their master that they were going to do so, such an act would not be within the words of the section? They could not under such circumstances be held to bail by a magistrate for any threats or personal violence, but could it be contended that.

they would not be indictable for conspiracy at common law? The argument on the other side must go, even if it has not done so already, to this extent, or it proves nothing, that the Act of Parliament has exhausted the law on the subject of conspiracy in relation to master and servant—that everything must be included in that section, and however illegal it might be at common law, all not included is rendered lawful, because omitted from the section. No authority has been quoted for such a proposition, and it certainly contravenes the ordinary rules of construction. [BRETT, J.—Is there not evidence of a molesting of the master with a view to coerce him to alter the mode of carrying on his business, as to the number of persons employed by him? What else was done to this master except interfering with his trade?] That is an interfering with his will. [BRETT, J.—His will in his trade.] The indictment would probably be good for molesting the master in restraint of his trade; if they combined to leave him at the just termination of his notice, that would have been in restraint of trade, and but for the Act of Parliament such persons might have been criminally responsible for doing it. [BRETT, J.—That refers to the third count. With regard, however, to the first count, which is “by threats and menaces, and other unlawful means,” to take back a workman against his will.] The matter with which this statute is dealing is totally different. The meaning of it, I suppose, is something of this kind, viz., to limit the definition of words which had been familiar in various Acts of Parliament, “molesting, obstructing, and so on,” and then, I suppose, it occurred to the mind of the person who drew the statute that there might be evasion of the Act if the limitation of the language was such as only to apply to the acts of the individual, and that a person could evade its provision by charging a combination of these acts as a conspiracy; and hence the framer intended probably that any such evasion of its meaning and purport should not be made. If my contention is the right one, viz., that the Act has no reference to the conspiracy charged in the first count, then the proviso can have no operation. In other words, the common law conspiracy of combining by threats and intimidation to coerce a man’s will is not at all within the statute. The real question is, whether this is a good count at common law or not. And so as to the second count. As to the third count, the objection is, that it is not proved by the evidence. [BRETT, J.—This is amply within the 30 & 31 Vict. As far as regards the questions for the jury, you are content, I suppose, that they should give their verdict on the third count.] On that or the tenth, which sets out a little more in detail the circumstances of the employment and the injury likely to occur from the coercion of the will. [BRETT, J.—I shall ask the jury on the separate counts. I am of opinion that the first count is a good count at common law, and that it is not touched by the statute to which you have referred. It is not suggested that the third count is not a good one. The only other point taken is, that there is no positive

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evidence that these contracts are such for the breach of which a criminal information would lie. No ground was taken for this other than that it was said the defendants were not persons employed within the meaning of 30 & 31 Vict. c. 141. I think that they were persons employed within that definition. I am further of opinion that, as the contract of employment was made between them as persons so employed and their masters, it comes within the statute, and that a criminal information would lie, and properly lie, for a breach of such a contract on the part of the servant. The exception, therefore, taken with regard to there being no evidence upon the third count fails, and there is evidence to go to the jury of a combination between the defendants and other persons.]

After *Straight* and *Williams, M.*, had addressed the jury,

BRETT, J., in summing up to the jury, said: The defendants are charged with having entered into a criminal conspiracy. It has been stated to you that the result of that conspiracy might have been, if not otherwise prevented, supposing it to have been successful, most lamentable to the public. And it has been stated to you on the other side, that even though that may be so, you ought not allow yourselves, in finding your verdict of guilty or not guilty, to be influenced by any such consideration. I entirely agree with the latter part of that observation. You must not allow yourselves to be influenced in coming to a conclusion whether these defendants are guilty or not by the view that from there being an agreement between the defendants to cease work, it would have had a most lamentable effect upon the City and the public. I entirely agree that so far as these men were the servants of the gas company they had no obligation whatever with regard to the public; that they had no greater obligation to the public than anybody else had, than any of us. They had entered into no agreement with the public, the public paid them nothing for their labour, and they were under no further obligation to the public than any other of the Queen's subjects. The question which you will have to determine is whether, as servants of the gas company, they or some of them have been guilty of a criminal conspiracy. In order to come to that conclusion, you must answer in the affirmative or the negative the questions which I shall ask you. If you answer them in one way the defendants are guilty and it will be your duty to say that they are guilty. But if you answer them in another way it will be your duty to say they are not guilty. The definition of a conspiracy generally is this: If persons agree together to do some unlawful thing, and proceed to do it, they are guilty of a conspiracy; or if they agree to do a lawful thing by unlawful means, and proceed to carry out their agreement by those means, they are guilty of a conspiracy. I say, that if they proceed to carry them out (for it signifies not whether they do carry them out) they are guilty of conspiracy. Therefore, a conspiracy consists of

an agreement between two or more persons—an agreement, observe—to do an unlawful thing, or an agreement to do that which is lawful by unlawful means. For instance, if two persons were to agree that one or both of them should shoot another, that would be clearly doing an unlawful thing; or if two persons should agree together that one of them should, by making false representations as to his means, induce a young woman to marry him, although the fact of inducing a young woman to marry is not an unlawful thing, yet if two persons were to induce a young person to marry one of them by false representations, that would be an agreement between them to do a lawful thing by unlawful means. These instances will enable you to understand the law as I am putting it to you. Therefore you will have to consider whether these defendants, or two of them, or more, have agreed together to do an unlawful act, or to do a lawful act by unlawful means. Upon an indictment for conspiracy, you cannot find one man only guilty, because, if one man only has been concerned in a matter, there is no agreement. But if five men are before you indicted for a conspiracy, you are not bound to find them all guilty; you may draw a distinction between them, you may come to the conclusion that two of them, or three of them, or that all five of them, are guilty. These men are indicted for a conspiracy, not only between themselves, as though they were the only conspirators, but they are indicted for conspiring among themselves and with other persons, although, as those other persons are not here, you cannot, of course, find those other persons guilty so as to make them amenable to the law. But it does not follow because other persons were guilty with the defendants, that if you think the defendants guilty, you should not find them guilty. You are to deal with their case alone, and with due regard to the case of each of them. Now, I shall ask your opinion as to this conspiracy in two forms. You have heard a discussion with regard to the mode in which this conspiracy is charged. It is charged in a different form, perhaps not very substantially different, but still in a different form, and I shall ask you, with regard to both, whether there is the one kind of conspiracy to which I shall first ask your opinion, or whether there is the other kind of conspiracy as to which I shall subsequently ask you. Now I shall first ask you this: Was there an agreement, or combination, which is practically the same thing, between the defendants, or between the defendants or others, or by some of them, to force Mr. Trewby, or the Gas Company, to conduct the business of the company contrary to their own will by an improper threat, or improper molestation; and I tell you that there is improper molestation if there is anything done with an improper intent, which you shall think is annoyance or an unjustifiable interference, and which in your judgment would have the effect of annoying or interfering with the minds of the persons carrying on such a business as this Gas Company was conducting. It is not necessary, in order that

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there should be a conspiracy to molest, that any one should be personally molested. It is enough if you should think that a molestation was designed and agreed upon with an improper intent, and which in your judgments would be an annoyance and an unjustifiable interference, and would in your belief be likely to have a deterring effect upon the minds of the employers—that is to say, of Mr. Trewby or the Gas Company. I tell you that the mere fact of these men being members of a trade-union is not illegal and ought not be pressed against them in the least. The mere fact of their leaving their work—although they were bound by contract, and although they broke their contract—I say the mere fact of their leaving their work and breaking their contract—is not a sufficient ground for you to find them guilty upon this indictment. This would be of no consequence of itself, but only as evidence of something else. But if there was an agreement among the defendants by improper molestation to control the will of the employers, then I tell you that that would be an illegal conspiracy at common law, and that such an offence is not abrogated by the Criminal Law Amendment Act, which you have heard referred to. This is a charge of conspiracy at common law, and if you think that there was an agreement and combination between the defendants, or some of them, and others, to interfere with the masters by molesting them, so as to control their will; and if you think that the molestation which was so agreed upon was such as would be likely, in the minds of men of ordinary nerve, to deter them from carrying on their business according to their own will, then I say that is an illegal conspiracy, for which these defendants are liable. That, gentlemen, is as to the first set of counts. But this conspiracy is charged in another form, and in that other form the real charge is that they either agreed to do an unlawful act, or to do a lawful act by unlawful means; and it seems to me more naturally to fall under the latter class. I shall, therefore, ask you whether there was an agreement or combination between the defendants and others to hinder and prevent the company from carrying on and exercising their business, by means of the men simultaneously breaking the contracts of service which they had entered into with the company. And I tell you that the breach without just cause of such contracts as have been proved in this case is an illegal act by the servant who does it. It is an illegal act, and what is more, it is a criminal act—that is to say, it is an act which makes each of them liable to the criminal law—and therefore if they did agree to interfere with the exercise of their employers' business by simultaneously breaking such contracts—even if you were to suppose that to interfere with the exercise of their employers' business was a lawful thing for them to do—yet if they agreed and combined to do that lawful act by the unlawful means of simultaneously breaking all these contracts, they were then agreeing to do that which may be assumed to be a lawful act by unlawful means, and that would bring them within the definition of a conspiracy. In such case you will say, if you think that so it was, that

they were guilty upon the second set of counts. Now, with regard to all this, what is the evidence. You find that these men and others, making up the number of five hundred men, were all in the employment of this Gas Company, and that Mr. Trewby was the foreman or person in authority managing for the company; and you find that there was another gas company called the Independent Gas Company, which carried on its business at Fulham; and the first thing that you know is that on the 28th of November a man at Fulham was discharged from the Gas Works there, and that in consequence of that there was a strike of sixty-two workmen at those works at Fulham. That is a circumstance which, because it is referred to, and because it may have been a motive and a ground of action, you must take notice of. Then you have it that, on the night of that same 28th of November, on the night of that same day when this thing happened at Fulham, in what they call the long spell at the works of the prosecuting company—that is, between twelve and half-past twelve at night—there was a meeting on the works of the night gang. The men who are on the night gang, some two hundred and fifty of them, do not work all the night, but they must remain on the premises all the night; but between twelve and half-past twelve is a time when they are not at work, and is the longest interval, as I should judge from the meaning of the terms “long spell,” at which they are not at work during the night. There was a meeting on that night. On Friday night, the 29th of November, that is, the next night, the defendant Wilson came in and made a statement. He said that he was appointed delegate for that night, and must go to the society; that the meeting of the society would be held at some place near Finsbury-square. Now, what is a delegate? He is, as you have been told, a person—one of the workmen, or one of the members of the Trade Union—who is elected by his fellows at the works of a particular firm, to go and represent them) that is, the workmen in that employ), at a meeting of the Union, to agree with the other delegates as to what is to be done, and to come back and inform his own constituents what it is they are to do. Then, besides the dismissal of the men at the Fulham works, you have the dismissal of Dilley at these works. Dilley was dismissed because he had refused to do certain work which he was ordered to do, and the reason which he gave at the time was, that it was work which he was not allowed by his Union to do. Therefore, the case stands thus: the man at Fulham had been dismissed, upon which sixty-two men had struck; a man had been dismissed from these works for not doing work which he was not allowed to do according to the laws of the association to which he belonged. Wilson is a delegate from the workmen from these works to the Union; he goes to say that Dilley is to take his pay on Saturday morning, that is, at the end of the week, and if he was paid up to Friday night he was to take it and say no more about it. That was at first not very clear, but it was more fully explained afterwards. The meaning of what Wilson said you are

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to gather from these facts, that in every week the company keep back one day's pay. It is not stated why, but you know very often it is for subscription to reading-rooms and for the assistance of men when they are sick. I don't know why, but for some reason they keep it back. Not that they do not pay afterwards all that is due; but one day's pay is kept back out of the six that he may earn. If Dilley got his whole pay, therefore, it would show that he was discharged, not that he was to be kept on. If he was paid one day short, it would show that they were keeping him on, and then, so far as Dilley was concerned, there was no grievance at all; but if he got his whole pay then it would show that he was discharged. Now, you will see what was to happen. Wilson said that according to the opinion, not of the men in these works only, but of all the delegates where he had been (for he said this on the 29th and he must have been on the 28th at the delegates' meeting), that if Dilley was paid all his back time he was to take it, and no further notice was to be taken of it until they heard from the delegate meeting. He said further that something had passed at the delegate meeting which he would not divulge to any one, not to his own father if he was to rise out of his grave. Now, what do you infer from these facts, and from this statement of Wilson's? Nothing was to be done if Dilley was paid in full. If he was paid in full, it showed that he was discharged, and then there was a grievance. At the first blush it would be supposed if that he was paid in full and discharged, the men would be called upon to act at once. But no; the opinion of the delegates is that under these circumstances you are not to act at once, but what you are to do is to wait until you hear from the delegate meeting. And something passed at the delegate meeting which was secret; because, of course, the form of speech about his father was mere exaggeration on the part of Wilson; it meant that the decision of the delegates was to be kept secret. "You are not to act now, you are to act when the delegates send you word." Is not that the meaning of it? The inference you must consider is whether the meaning is not—"Don't you go out now, because there may be arrangements to be made. If this man is discharged, and you are so ordered by the delegates, you will have to go out; but it will be when all the other men who are members of the union, and not only you at these works, are going out at the same time." It is for you, of course, as a jury exercising your judgment fairly as between these defendants and the law, to say what is the meaning of it; and what is the meaning of that which Wilson said. The witness who proves it says, "I cannot say the other defendants were there. I believe that we were all there, but I can't say." Then he is cross-examined and he says, "Jones on the Thursday night had ceased to be a delegate, and Wilson was the delegate for that night, but he was elected as a delegate for that night only." If so, it was on the Thursday night that Wilson attended the meeting of delegates. Before that night Dilley had been discharged,

or was likely to be discharged, or was threatened to be discharged, and the men at Fulham had been discharged. Then he comes back from the meeting of delegates, and on the 29th this is the information that he gives. Now we have what happened on the Monday morning. The first person that had notice, on the part of the employers, of anything likely to happen, was not Mr. Trewby, but the other man, Leonard. He says: "I am foreman of stokers. On Monday, the 2nd of December, I got to the works at ten minutes to six; when I got there I found a great many of the day gang there already; they were standing in the retort house and in the lobbies. I waited for some time to see if they would begin work. Some observations were made, and I then went and fetched Mr. Trewby." Then you have Mr. Trewby. He says the night gang go on at about five, and come off at about half-past five next morning; they work for about five hours. The change of the gangs takes place between six and seven; some come at six, and some at half-past six, and some at seven; those are for different portions of the process. On the 22nd of November, he says, the matter was reported about Dilley. "On Monday, the 2nd of December, Collier, the foreman, came to me about a quarter to seven in the morning. In consequence of what he told me, I went to the four retort-houses on the works; this was a quarter to seven o'clock. I saw the night and day gangs there." Therefore when Mr. Trewby was sent for there must have been this unusual state of things happening; that is to say, that being a quarter to seven, when the night gang would have gone home to bed and the day gang to work, you have the whole five hundred men there; the night gang had stayed on and the day gang had arrived. Before the gang begins to work they usually change their clothing. None of the day gang had changed their clothing in order to go to work, so that you have two hundred and fifty men all doing that which was contrary to the rules. Mr. Trewby further says: "I asked the men what they wanted to see me about;" so that you see the message which had been taken to him was not merely that the men were doing something which he was bound to look after, but that they wanted to see him; and the message sent was not that one man wanted to see him, not that any one individual wanted to see him, but that they all wanted to see him; and when he goes to see them he asks what they wanted to see him about. He says: "I noticed there Jones and Wilson." You recollect, gentlemen, that Wilson is the man that had been to the delegates and made that statement on Friday night the 29th. "I noticed Jones and Wilson standing close to me; I noticed Webb there." Now Webb is a person who took a prominent part, but he is not one of the defendants; he is not here. "I noticed Webb there. They said they wanted to see me about Dilley's case. Webb was the first spokesman. I asked, 'Where are the day gang?' Jones said (one of the defendants): 'The day gang are all here.' I said, 'Why don't you go to work?'" Now what was Jones's

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answer? Not “*I have decided;*” but “*We have decided not to go to work until Dilley is reinstated.*” He said that in the hearing of the five hundred men who had sent to the superintendent, whom they called the governor, to see them. There they are in front of him. He says, “What do you want with me?” Webb stands forward as the first spokesman. Jones stands forward as a spokesman, and Jones does not say, “*I have decided,*” but, in the face of all these five hundred men he says, “*We have decided not to go to work until Dilley is reinstated.*” Wilson spoke to Mr. Trewby to the same effect; Webb spoke to the same effect. Therefore you have Wilson the defendant, Jones the defendant, and Webb, who is not here, stepping as it were forward in front of these other workmen, and the statement they all make is, “*We have decided not to go to work until Dilley is reinstated.*” “*I said to them (that is, to Webb), as he belongs to the night gang, ‘You should have left the works.’ It was then past seven o’clock. I said, ‘The time has now elapsed when the whole of you should have gone to your work. The Company have always behaved liberally towards you. They have conceded all you have asked from time to time, and I call upon all of you who are well disposed towards the Company to go on with your work.’”* What was it that Jones said? “*Yes, ask them that.*” Was that a sarcasm? Mr. Trewby says “*‘I ask all of you who are well disposed to the Company to go to your work,’ and Jones says, ‘Yes, ask them that.’ Not a man stirred, or separated himself from the rest. I asked all those who were well disposed to separate from the rest. I said both to Jones and Wilson, ‘Am I to understand that you refuse to go on with your work until Dilley is reinstated?’ They (that is Jones and Wilson) said ‘Yes.’”* Now you must consider what had happened, and what Wilson said on the 29th. They said that Dilley’s discharge and the Fulham matter had been put into one. Does that mean that they were to strike, unless the Fulham matter and Dilley’s matter were both settled? And if it does mean that, who had put them into one? Was it the persons at these works only that had put them into one? The persons at these works, unless they were combined with others, had no interest in the Fulham works. Had they any combined action with others with regard to the Fulham works, and if so, where was that combination? You know that they sent a delegate to the society; you don’t know whether there was a delegate from the Fulham works, but you must ask yourselves what was the meaning of Dilley’s discharge and the Fulham matter being put into one. Mr. Trewby goes on:—“*I said ‘I have nothing to do with the affair at Fulham.’ These things were said loud enough for the other workmen to hear. They all stood together, but the other workmen said nothing; I told them I would give them ten minutes for consideration; I said that loud enough for them to hear. I went away into the stoker’s lobby. I saw a man named Simmons in the lobby and in consequence of what*

Simmons said to me I asked, when I got back, for Bunn and Ray, who are two of the defendants." You have heard of Wilson, Jones, and Dilley, now you hear of Bunn, and Ray, and Webb. You must exercise, of course, to some degree your imagination, so as to get at the truth of what was taking place. Bunn and Ray are there, according to their evidence, and they stand forward. Mr. Trewby proceeds: "I said to them, 'Am I to understand that you refuse to go on with your work, till Dilley is reinstated?' They said, 'Yes.' I said, 'You know that you are acting illegally, that you can't leave your work without notice, that some of you are under a monthly agreement and some under a weekly agreement, and you must not leave your work without giving us proper notice. I will give you ten minutes more for consideration, and then you will let me know the result.' Jones said, 'Well, we may as well tell you at once, we have made up our minds.' I said, 'I will let you have ten minutes for reflection.' I then went away, and in about ten minutes I returned and Jones again said, 'We are of the same opinion.' Jones, Bunn, Ray, and Webb were there then; I won't be sure about Wilson being there then. The gangs were still there, not so many as there had been. Jones said, 'They were still of the same opinion.' I said, 'Very well! then I will reinstate Dilley, but I reinstate him under protest; now go on with your work.' Webb said, 'that they did not know what I meant by protest.' I said, 'Do you?' and he said, 'Yes.' I said, 'Perhaps you will explain it to them.' He said to the men (that is to the body of the men), 'The governor means to punish you.' He said to me, 'Will you withdraw that word?' I said, 'How can I? You insist upon Dilley being reinstated, and I reinstate him under protest.' I said to the men (that is the body of men) 'Now go on with your work.' Webb said, answering for the men, 'We may as well tell you that we cannot go on with our work until the men at Fulham are let in.'" They go away again, you see, from Dilley's case and now it is that they cannot go on with their work until the men at Fulham who are out, the sixty-two men, are let in. Mr. Trewby said, "That is a matter with which I have nothing whatever to do, and I can do no further in it." They said they could not go to work until they had orders from their delegate meeting. I have pointed out to you what took place at the beginning. Wilson went to the delegates' meeting, and the order was "Don't act at once, only act when you receive orders." Then all this contest, and then, at the end, what is said in the face of these men is, that they could not go to work until they had received orders from their delegates' meeting. Mr. Trewby further deposes: "Webb said that, and I left them to consult with my assistants and foreman. The night and day gangs then walked off in a body. I saw Dilley walking away with the other men." Therefore, you have here evidence that all these five defendants were present, and there is evidence of their being seen at different parts of the transaction during which they were

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present with the five hundred. You have now heard what took place. You have heard that the manager is sent for, that he goes, and there are all the men—those who ought to have been away from the works as well as those who ought to have been at work—collected, not prepared for work, but standing there as one body, and these defendants one after another acting as spokesmen between them. You have it that these two terms were insisted upon, namely, that Dilley should be reinstated, and that the Fulham men should be reinstated also, otherwise they would not go to work; and then it is said, “We cannot go to work until we have received orders from the delegate meeting;” and then upon the manager (who had agreed to reinstate Dilley, although under protest), refusing to take any responsibility with regard to the Fulham matter because he could not, all the men go off in a body leaving the works there without men to work them. There was no violence of demeanour, nor threatening of any sort by any of the men, that is to say, you are to take it that no threats of any personal violence were made, either with regard to Mr. Trewby, or with regard to the other workmen, except that which was hinted, but which was practically given up, and which I think, therefore, you ought not to take into account, namely, the threat to the Germans. You may take it substantially that whatever was done by these men was not done by threats or personal violence, either to the employers or to each other. The evidence of what was done is before you. It is for you to say whether this evidence proves to you that there was an agreement amongst these defendants, and practically amongst all the others, because, whether they were more or less willing is unimportant, if they succumbed and did agree in the combination that unless their demands with regard to Dilley, and also perhaps with regard to the Fulham men, were complied with they would cease work. You have to say whether in your judgment that was not an agreement, not merely to cease work, but to cease work simultaneously and without notice, because as to this what the manager said is most important. He said “You have no right to leave your work without giving us proper notice.” Well, according to those contracts, they had not. What would have been the result if they had given notice? Why obviously that the company would have had an opportunity to get workmen somewhere else. But if they went away without giving notice, and simultaneously, what would be the consequence to the company? You must ask yourselves whether, in all human probability, it would not have been that the company would have been left without workmen at all, and unable therefore to supply more than the quantity of gas which they had in store, and you have heard that they had not storage for more than a third of what they make in the day. That would seem to show that they could not rely on their storage for the supply of more than a single day. You then have the evidence of three or four men who were employed, Roffey and others, who tell you

that they arrived at these gas works in the morning at their usual time, about six o'clock. Roffey says, "I saw all the defendants there when I arrived. Dilley told me if I did not go with the rest I should be spotted." That is going further than anybody else has done; it is not merely an agreement to stop work, but it certainly is a kind of threat and annoyance—and a terrible annoyance—to this man from Dilley. There is, as far as I can see, no evidence that the others combined in that threat, but it is a lamentable thing that Dilley should threaten a man with that which for a workman is as great a crime as he could very well commit—a moral crime as against a fellow workman to say to him "Mind! you shan't follow your own will; if you do you shall be spotted;" that is to say, you shall be sneered at and be considered degraded by all the men of your own position and by your fellow workmen. Gentlemen, you must not allow that to weigh against the other defendants in this case, because there does not seem to be any evidence against them of a conspiracy to be carried out in that manner. Penn says, "I saw Dilley when I went; I stripped for work; Dilley asked where I was going; I said to work. He told me to put my clothes on, or I must put up with the consequence of it." But again, this is only Dilley. Byes said, "I went and saw Bunn there and he asked me where I was going; I told him I was going to work; he said 'There is no work to day, the work is stopped.'" Now you know the work was not stopped by the employers. The work was stopped, if by anybody, by the agreement of these men among themselves. "I asked him what for? he told me to go to the Castle Tavern, in the Barking-road, and I should know." This introduces a subsequent feature, which can only be of importance in order to lead your minds to this; was there a combination or agreement? We have here Bunn, and I think we have also Dilley, telling the man to go to the Barking-road. But that is not of so much importance as this. You will find that all the men did go to the Barking-road, and to a tavern called the Castle Tavern. So you have not only the fact of all the men leaving simultaneously, but you have also the fact of their all going to the same place, their rendezvous. "I saw Jones and Ray there. I said to Jones, 'What is the matter?' He told me it was all through Dilley and the men at Fulham; he told me that Collier had asked him to call the men together to ask them if they would go to work and the men said no. Collier told him to ask the firemen to go to work and they said no." Then you have the German witnesses. About them I do not propose to trouble you, as I do not think under the circumstances they carry the case further. They are to the same effect, that they were told not to work. Now, gentlemen, it comes to my mind to be an essential matter for you to consider what was the position of the Gas Company, and for that purpose you must consider what was the relation between the Gas Company and the public. As between the Gas Company and the public, the Gas Company were supplying the

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whole of the city of London, and a great part of what is called the west end of London, with gas. And the Gas Company would be under contract no doubt to supply a great many persons with gas. But, whether they were under contract or not, you will ask yourselves whether the stoppage of such a large business, and the stoppage of it in that way—namely, that it would reduce the city of London and the suburbs to darkness—whether that would not be a tremendous blow to the company, the employers of these men. I say nothing of the public; but is it not a case in which the men, however little intelligent they might be, would have it in their minds that their employers never would run the risk and take the responsibility of putting the whole of London, or all that part of London which they supplied with gas, into darkness? Then what was the intent in their minds? Was it a wicked intent—that is to say in your judgment was it anything like fair dealing as between master and servant, and between man and man, that the men should agree simultaneously to stop work, and such a work, if they had the intent or the suspicion that by so doing they would put their masters under a terrible responsibility? I must ask you whether, in your judgment, this must not have been in their minds: “If we let our employers know or think we shall go off simultaneously we shall frighten them so with regard to the mode of carrying on their business, that they must alter their mode of doing their business, and therefore they must succumb to our wishes, namely, they must take into their employment the man they have dismissed, and whom they dismissed because it is admitted he refused to do what he was told to do, not upon the ground that it was not within his contract to do it, but upon the ground that somebody not his master had told him he was not to do such work. Is that in your judgment an improper interference with the mode of carrying on the business of the employers? And do you think, from the mode in which it was done, that it was in the minds of the men that it would be interfering with their master’s will? Do you think that interference was made under such circumstances as would control the will of the masters of ordinary nerve under such circumstances? It is to obtain your view of this that I ask you, with regard to this first set of counts—Do you think that a conspiracy is made out against these men; first, that they tried to force the company to conduct their business contrary to the will of the company by an improper threat or improper molestation? Do you think that the defendants agreed together to force the company to conduct their business contrary to their own will—that is, to force the company to employ a man against their will, which man the company, unless so forced, would not employ? Then, do you think that was done by an improper threat or molestation? And in order to arrive at this, I tell you there would be an improper molestation if anything was done with an improper intent which you think was an unjustifiable annoyance and interference with the masters in the

conduct of their business, and which in any business would be such annoyance and interference as would be likely to have a deterring effect upon masters of ordinary nerve. Therefore, do you think that the defendants agreed to force their masters to carry on their business in a manner against their will by improper molestation—that is to say, by annoyance or interference which in your minds was so unfair as to be unjustifiable, and which would in your judgments deter masters of ordinary nerve from carrying on their business as they desire, such molestation being of this kind: “Inasmuch as we know you are a gas company lighting a great part of the metropolis, we suggest to you this—Suppose we all leave work at the same moment; if we do, you cannot carry on your business; you must then throw every district into darkness. You dare not do that against your customers and against the public, and therefore you must yield to what we demand.” Was that an improper interference, in your judgment, and was it such an interference as in your judgment would be likely to deter masters of ordinary nerve from carrying on their business according to their own will? If you think that, you must say that these defendants are guilty of the conspiracy. If you think that it is not made out in any one of the circumstances which I have put to you, you must say that the defendants are not guilty. Of course you are at liberty to draw any distinction between these defendants that you may think fit; but it was practically an agreement amongst all the workmen. As it seems to me, there is no distinction between any of the defendants, but the evidence is as nearly as possible equal as to them all; and your verdict will be, I think, that they are all guilty or none. Then comes the other point—Do you think that they agreed to interfere to hinder and prevent the company from carrying on and exercising their business according to their own will by those other means, namely, by simultaneously breaking all the contracts of service into which they had entered. It has been said that the breaking of these contracts would not be an offence, because they would not be within the Masters and Servants Act. Now, according to that Act, the word “employed” shall include any servant or workman who has entered into a contract of service with an employer. It is obvious that these men had all entered into a contract of service with their employers; but not only these men, for the evidence is that all the five hundred men had contracts of service with their employers. Then the Act goes on to say that the words, “Contract of service,” shall include any contract whether in writing or by parol. Now, to say that these workmen had not entered into a contract by parol seems to me to be absurd. Some of them sign these agreements that have been put in, and others go to the works and are paid weekly wages, but with a notice put up in their pay-room that they are not to leave and that they are bound not to leave without a week’s notice. This is a contract of service and it signifies not whether it was in writing or not. Then, having entered into these contracts, the Act says, “When-

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ever the employed shall neglect or refuse to fulfil his contract, he may be summoned before a magistrate and dealt with summarily.” Therefore, the breach of such a contract so made is an offence, and the breach of that contract, I tell you, is an unlawful act. Now the breach suggested is this. They were all entitled to leave the service with notice, but none of them were entitled to leave without notice, and I have pointed out the importance of that in this particular case. If they leave with notice, their places can be supplied; if they leave without notice, that is to say, simultaneously—the five hundred men—their places cannot be supplied. If you think, therefore, that they had entered into an agreement not merely to break their contracts, but to break them simultaneously, do you or do you not think, even if they might break their contracts and cease to work, and even if they might agree to do it—do you or do you not think that was the doing or agreeing to do a lawful act, that is, to leave the employment? Even if you assume it to be a lawful act, do you think this was an agreement to do that lawful act by unlawful means, that is to say, by breaking their contracts—by leaving without notice at one and the same time? And in order to show the spirit and purpose with which they did it, do you think they did it with evil intent, that is, the evil intent of forcing their masters to carry on their business in a way which they knew was contrary to the will of their masters? If they did, you will say they are guilty of a conspiracy; if you think they did not, you will say that they are not guilty. Therefore, if you find them guilty of one of these conspiracies, you must say that they are guilty, and perhaps you will tell me of which. It does not at all follow that you may not be of opinion that they are guilty of both conspiracies, and if so you will tell me. As to any trouble, or annoyance, or anger, which they may have caused to the public you must not take that into account. I mean, you must not find them guilty because you think them wicked in that respect. Still, you must take this into account: What had they in their minds with regard to their masters? If you think they are guilty of these conspiracies with regard to their masters you will say so; but if, upon consideration, you doubt it, with regard to all or any of the defendants, you will, of course, give them the benefit of that doubt, and say that they are not guilty. Gentlemen, you will try this case without prejudice, and without any view of what the result may be; and you will say whether, within the law as I have laid it down to you, they are guilty of one or both the conspiracies. If you think they are, you will say that they are guilty; if you think they are not, of one or either, you will say that they are not guilty.

The jury retired at 4.37 to consider their verdict, and returned into court at 4.55, finding all the defendants guilty.

BRETT, J.—Do you find them guilty of both kinds of conspiracy that I put to you?

The Foreman.—We find them guilty on the 2nd.

BRETT, J.—Of the second kind of conspiracy, you mean?

The Foreman.—Yes, my lord.

BRETT, J.—And not of the first?

The Foreman.—Yes.

BRETT, J.—May I ask on what account you recommend them to mercy?

The Foreman.—On account of their great ignorance and being misled, and their previous good character.

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Sentence—Twelve months' imprisonment with hard labour.(a)

COURT OF EXCHEQUER.

January 20, 1873.

(Before KELLY, C.B., MARTIN, PIGOTT, and POLLOCK, BB.)

RICHARDSON v. WILLIS.(b)

Libel—Indictment for by a private prosecutor—Judgment for the defendant—Recovery of his costs—6 & 7 Vict. c. 96, s. 8.

By the 8th section of the 6 & 7 Vict. c. 96 (Libel Act), if a private prosecutor proceeds by indictment for a libel, and the defendant is acquitted, such defendant may recover from the prosecutor his costs sustained by him by reason of such indictment to be taxed by the proper officer of the court before which it was tried.

Held, that the proper and only mode of recovering such costs so taxed is by an action.

THIS was a demurrer to a declaration in an action brought under the provisions of the 6 & 7 Vict. c. 96, s. 8 (the Libel Act) to recover from the defendant the costs incurred by the plaintiff in an indictment for libel, wherein the defendant was the prosecutor and the plaintiff was the defendant, and upon

(a) Her Majesty, by the advice of the Home Secretary (the Right Hon. H. A. Bruce), subsequently remitted eight months' imprisonment, and reduced the sentence to four months' imprisonment with hard labour.

(b) Reported by T. W. SAUNDERS, Barrister-at-Law.

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which indictment the present plaintiff was found not guilty (a). The declaration stated "for that after the passing of an Act passed in the 6 & 7 Vict. entitled, &c., the defendant then being a private prosecutor within the meaning of the said Act, appeared at the assizes holden in and for the county of Essex, and indicted the plaintiff upon the charge of falsely and maliciously publishing a defamatory libel of and concerning the defendant, and as such private prosecutor as aforesaid preferred a bill of indictment therefor against the plaintiff before the grand jury, and gave evidence before the petty jury on the same, and the plaintiff says that the said petty jury acquitted him of the premises in the said indictment so charged upon him as aforesaid, and found him "not guilty" upon the same. Whereupon judgment was given for the said plaintiff, and he was duly discharged of and from the premises in the said indictment specified. Whereby and by reason of the aforesaid statute and of the premises, the plaintiff became entitled to recover from the defendant the costs sustained by him, the said plaintiff, by reason of such indictment as aforesaid, and the said costs were duly taxed by the proper officer of the court before which the said indictment was tried as by the aforesaid statute is directed, and the same were allowed at the sum of 52*l.* 8*s.*, and all conditions have been performed and all things have happened and all times have elapsed necessary to entitle the plaintiff to the payment of the same. Yet the defendant has wholly neglected and refused to pay the said sum so taxed and allowed as aforesaid, and the same is still unpaid and owing to the plaintiff," &c.

The defendant pleaded several pleas traversing the material allegations of the declaration, and also demurring to the declaration.

Willis appeared for the defendant in support of the demurrer. An action is not the proper remedy whereby the plaintiff can obtain his costs. He should obtain them by execution upon the taxation of the officer of the court. [MARTIN, B.—I am not aware of any power which a judge at the trial has to issue execution. KELLY, C. B.—The word "recover" must surely mean recover by action]. The record of the indictment could be removed into this court and execution might then issue. [MARTIN, B.—I never heard of such a thing, and I have spoken to Mr. Avery, of the Central Criminal Court, a gentleman of very great experience, and he has never heard of such a proceeding.]

Philbrick, for the plaintiff, was not called upon.

KELLY, C. B.—The statute provides that in certain circum-

(a) By the 8th section it is enacted that "in case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court before which the said indictment or information is tried."

stances the defendant in an indictment for libel shall recover his costs from the prosecutor, and an action in the present instance is brought to recover them, and by the general rule of law, where no other means of redress are pointed out, the party has his remedy by an action in one of the Superior Courts.

MARTIN, PIGOTT, and POLLOCK, BB., concurred.

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Judgment for the plaintiff.

Attorney for the plaintiff, *Oldman.*

Attorney for the defendant, *John Evans.*

NORFOLK CIRCUIT.

SUFFOLK SPRING ASSIZES, 1872.

(Before BYLES, J.)

REG. v. BULLARD. (a)

Grand Jury—Deposition of absent witness—Practice.

Upon a bill of indictment being presented, the Grand Jury made an application for the deposition of an absent witness.

Held, per Byles, J., that they were entitled to peruse the deposition without formal proof that the witness was too ill to travel.

ROBERT BULLARD was charged with unlawfully and maliciously wounding Joseph Cooper, causing grievous bodily harm, at Bentley, on the 22nd of July, 1872.

The Foreman of the Grand Jury came into court and asked his Lordship for the deposition of an absent witness, without whose evidence they had no materials to find a bill.

BYLES, J., granted the application, and stated that the Grand Jury were not bound by any rules of evidence. They were a secret tribunal, and might lay by the heels in jail the most powerful man in the country by finding a bill against him, and for that purpose might even read a paragraph from a newspaper.

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

NORFOLK CIRCUIT.

BEDFORD SUMMER ASSIZES, 1872.

(Before Mr. Justice KEATING.)

REG. v. WILDMAN. (a)

Practice—Indictment found at Quarter Sessions—Trial at the Assizes.

An indictment was found at the county sessions at Bedford against the defendant for obstructing a highway. Upon the certificate of such finding, the defendant was taken before a magistrate and bound by recognisance to appear and plead at the assizes. The indictment was not transmitted to the assizes, but was in the custody of the clerk of the peace.

Held, that the judge of assize had no power to order the clerk of the peace to send the indictment to the assizes; that as it was found at the sessions, and not transmitted for trial at the assizes, the court had no jurisdiction to try the same.

But a second indictment for the same offence being found by the Grand Jury at the assizes,

Held, that the defendant, being bound to appear by recognizance, must be called upon to plead to the second indictment.

EDMUND WILDMAN was indicted for obstructing a highway at Biggleswade on the 24th of May, 1872, and on divers other days and times up to the 2nd of July, 1872. He had been committed to take his trial at the assizes, the indictment having been found at the quarter sessions for the county.

Bulwer, Q.C., and Graham for the prosecution.

Naylor for the defendant.

Graham applied to the court to make an order directing the clerk of the peace for the county to return the indictment found to this court. He explained that steps had been taken under sect. 3 of 11 & 12 Vict. c. 42, whereby the defendant had been bound over to appear at these assizes; but the difficulty arose from the fact that, the indictment having been found at the quarter sessions, the clerk of the peace required an order to return it to the clerk of the assize.

KEATING, J.—What cognizance have I of the indictment being found? Have I jurisdiction to try such an indictment here?

Graham.—I apprehend that, the recognisance being made returnable to the Assizes, your Lordship has power to make the defendant answer the indictment.

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

KEATING, J.—This is not a case where the indictment has been transmitted to this court by the justices, which could have been done had they wished it to have been tried here. There may be reasons for their wishing to try it themselves, and undoubtedly they have the power to do so. The proceedings under the 11 & 12 Vict. c. 42, s. 3, are merely a substitution for a bench warrant.

Graham.—The defendant is committed until delivered by course of law, and I apprehend your Lordship must deliver him under your commission of gaol delivery.

KEATING, J.—The indictment is in the custody of the clerk of the peace, who is not an officer of this court. The defendant is committed to these assizes, and if there be no indictment here for him to answer, I shall discharge him by proclamation. The defendant is here to answer an indictment found at quarter sessions, which has not been remitted to this court. I know of no authority whereby I can order the clerk of the peace to send the indictment to this court, for how could that fact appear upon the record?

Graham.—Then I shall send up another indictment to the grand jury now sitting.

This was done, and a true bill returned. *Graham* then applied for a bench warrant.

KEATING, J.—I offer no opinion as to the second indictment. I will issue a bench warrant if necessary, but I suppose the defendant is present under his recognisance. I think, therefore, that he must surrender and answer, and I shall direct him to be called and plead to the indictment just found.

Naylor, for the defendant, offered no opposition to this course.

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NORFOLK CIRCUIT.

SUFFOLK SUMMER ASSIZES, 1872.

(Before BYLES, J.)

REG. v. KEW AND JACKSON.(a)

Manslaughter—Contributory negligence.

Contributory negligence is not an answer to a criminal charge, as to a civil action.

THE prisoners were indicted for manslaughter. It appeared that on the 2nd of June the prisoner Jackson, who was in the employ of Mr. Harris, a farmer, was instructed to take

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

REG. his master's horse and cart, and drive the prisoner Kew to the
 v. Bungay railway station. Being late for the train, Jackson was
 BULLARD. driving at a furious rate, at full gallop, and ran over a child going
 — to school, and killed it. It was about two o'clock in the after-
 1872. noon, and there were four or five little children from five to seven
 — years of age going to school unattended by any adult.
Manslaughter *Metcalfe* and *Simms Reeve*, for the prisoners, contended that
 — *Contributory* there was contributory negligence on behalf of the child running
negligence. on the road, and that Kew was not liable for the acts of another
 man's servant, he having no control over the horse, and not
 having selected either the horse or the driver.

BYLES, J., after reading the evidence, said:—Here the mother lets her child go out in the care of another child only seven years of age, and the prisoner Kew is in the vehicle of another man, driven by another man's servant, so not only was Jackson not his servant, but he did not even select him. It has been contended if there was contributory negligence on the children's part then the defendants are not liable. No doubt contributory negligence would be an answer to an action. But who is the plaintiff here? The Queen, as representing the nation; and if they were all negligent together I think their negligence would be no defence, even if they had been adults. If they were of opinion that the prisoners were driving at a dangerous pace in a culpably negligent manner, then they are guilty. It was true that Kew was not actually driving, but still a word from him might have prevented the accident. If necessary, he would reserve the question of contributory negligence as a defence for the Court of Criminal Appeal.

The jury acquitted both prisoners.

NORTHERN CIRCUIT.

CARLISLE.

February 24, 1873.

(Before Mr. Justice ARCHIBALD.)

REG. v. HAGAN.(a)

Murder—Evidence of motive—Admissibility of.

Expressions denoting a bad feeling toward deceased made use of some time before the crime is committed are admissible in evidence, but the jury must receive them with great caution.

HUGH HAGAN was indicted for the murder of Joseph Hagan at Cleator Moor on December 7, 1872.

Campbell Foster was for the prosecution.

Thurlow was for the prisoner.

The deceased was an illegitimate child of a widow, Eleanor Hagan, who had previously been the wife of prisoner's cousin. The case for the prosecution was, that he had killed the child, who was eighteen months' old, while it was in bed, and the motive assigned was that he had done so as he considered it in the way, and only eating the other children's bread. It was no relation of his, however, and he did not contribute to the support of it, or, indeed, of Eleanor Hagan, in any way whatsoever.

Eleanor Hagan was called and said: I am the mother of the deceased. He was eighteen months old; he was illegitimate. My husband, who died six years ago, was a cousin of the prisoner. The prisoner is no relation of mine; he used often to come and see the children; he did not live in my house; he seemed very fond of them. He was a man of violent passions; would sometimes complain of the children plaguing him. On December 7th, I was at the market, and left my eldest son to look after the house; he came into the market in the afternoon, and made a complaint to me about the prisoner (it was that the prisoner had thrown deceased violently on the bed because it was crying). I came back from the market about 6.45, and found the door of the house locked. Thinking something was wrong, I burst it open, and as it flew open, the prisoner tried to get from me. I shouted "Police!" I then went into the bedroom and found deceased bleeding from the nose, with several wounds about the head; he died next morning. No one was in the house but the prisoner when I burst open the door.

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.

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Campbell Foster was then going to ask witness what prisoner said to her about the child a fortnight ago, but

Thurlow objected on the grounds that it was not evidence; it was made sometime before, and if the learned judge would look at the depositions, he would see that it could only tend to prejudice the case of the prisoner in the eyes of the jury; that a mere use of language denoting illwill or threats made sometime ago ought not to be used as evidence against a prisoner when intended merely for prejudice unless at the time he had shown some intention of carrying them out, or had used some violence together with them.

ARCHIBALD, J., said that he would consult Pollock, B., who was in the other court. On his return, he said that after careful consultation with Pollock, B., he had come to the conclusion that it was admissible, but he should tell the jury to receive it with great caution.

Witness then gave the following evidence, which was the evidence objected to: "About a fortnight previous to the 7th of December, the prisoner said to me, 'the child is no good; it's eating the other children's "tommy" (food).' I told him it was none of his business, he had nothing to do with it."

Other evidence was given to shew how death was caused, and the prisoner was found

Guilty.

COURT OF QUEEN'S BENCH.

January 20, 21, and 29, 1873.

(Before COCKBURN, C.J., BLACKBURN, MELLOR, and LUSH, JJ.)

REG. v. ONSLOW AND WHALLEY.(a)

Contempt of court—Speeches at public meetings—Pending trial—Collection of funds for defence—Vituperation of judge and attacks upon witnesses—Privilege of members of Parliament.

The defendant had been committed for perjury by the judge, who tried an ejectment in which he was claimant, and in which the

(a) Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

issue was the question of his identity with a certain baronet alleged by the defendants to be dead. The jury, during the defendant's case, had expressed themselves satisfied that the claimant was not the person he swore he was, and he elected to be nonsuited. The grand jury at the Central Criminal Court found true bills against him for perjury and forgery; the prosecution removed the indictments by certiorari into this court; and it had been fixed, upon application of the Attorney-General, that the trial should take place at bar next Easter term. The defendant and his friends, amongst whom were two members of Parliament and one barrister-at-law, had held public meetings for the purpose of obtaining money for the defence at the forthcoming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defence at the trial of the ejectment, and prejudice and partiality to the Lord Chief Justice of this court, who, they said, had proved himself unfit to preside at the trial of the indictments. They also asserted the innocence of the defendant, and the injustice of his treatment.

Held, that the trial of these indictments was a proceeding of the court then pending; that, although the remarks at the meetings might be the subject of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation to deter the Lord Chief Justice from taking any part in the trial, and also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantably interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court; and that it was the duty of the court to put a stop to them.

The members of Parliament who made these remarks, when summoned to answer for contempt, apologised and submitted themselves to the court. They were, therefore, only fined 100*l.* each; but it was held that the court would not allow the privilege of the House of Commons to prevent punishment by imprisonment of its members for a contempt in the administration of justice, if the occasion required it.

UPON the application of the prosecution, Mr. Guildford Onslow, M.P. for the borough of Guildford, and Mr. Whalley, M.P. for the city of Peterborough, had been summoned to answer a charge of contempt of court by endeavouring to prejudice the course of justice upon the trial of indictments which have been removed from the Central Criminal Court, but have not yet come to be tried. The defendant had been claimant in an ejectment, *Tichborne v. Lushington*, in the Court of Common Pleas, the only issue in which was the identity of the claimant

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with the person he alleged himself to be, viz., Sir Roger Charles Doughty Tichborne, Bart. The circumstances of the action are to be found reported in the case of *Tichborne v. Mostyn* (L. Rep. 8 C. P. 29 ; 26 L. T. Rep. 554.) The trial lasted 103 days, and during the case for the defence the jury expressed their opinion in opposition to the claimant's alleged identity, and the claimant elected to be nonsuited. Bovill, C. J., who tried the case, then committed the claimant for perjury, and upon his Lordship's suggestion the prosecution was undertaken by the Treasury. Subsequently true bills for perjury and forgery were found against him by the grand jury at the Central Criminal Court; and those true bills, which are the indictments in this case, were removed upon *certiorari* by the prosecution into this court. The trial of the defendant for perjury has, upon the application of the Attorney-General, been fixed to be held at bar, and to be commenced during next Easter term. Defendant, who is on bail, has, with his friends, been addressing public meetings in various parts of the country, convened by them for the purpose of obtaining funds in aid of the defence at the forthcoming trial.

Two of these public meetings were held at St. James's Hall, in the county of Middlesex, on the 11th and 12th of December last. Mr. Onslow, Mr. Whalley, and the defendant were present on both occasions. On the 11th of December Mr. Whalley, who was in the chair, addressed the meeting, and introduced Mr. Onslow, who then addressed the meeting and spoke in these terms :—"It may be as well that I should explain to you that our object in addressing the British public had its origin on these grounds. We were refused in the House of Commons replies to questions we put to the Ministers. Our mouths were shut in that House, and knowing, as we do, that we are supporting the right man in a good and honest complaint, we have nothing left but to appeal to public opinion. We don't ask you to say whether he is or is not Sir Roger Tichborne ; but we ask you to say and believe that he is an Englishman, and, as an Englishman, that he is justly entitled to fair play, which is the birthright of every one of our countrymen. (Cheers.) Now, I maintain that in the late trial he did not receive the fair play he is entitled to. The long-winded speech of the Attorney-General, lasting twenty-one days (hisses), was never replied to, and we have a perfect right to assume that had Sergeant Ballantine been permitted to reply he would have turned the minds of the jury and of the public as much as they were turned by the Attorney-General. (Cheers.)"

Mr. Onslow concluded a long speech by saying that in the great undertaking in which they were engaged they had obtained information, and would bring forward witnesses on the trial, that would, if the claimant were treated with the justice he had a right to demand, lead to his honourable and triumphant acquittal.

At the second meeting, held on the next day, at which a Mr. Skipworth was in the chair, Mr. Whalley spoke thus :—"There

are then, gentlemen, in this case two questions. In the first place is this man truly Sir Roger Tichborne? (Loud cries of 'Yes, yes.') In the second place is that fact known? Now, mark and observe this, because these are words which I speak with a due sense of the responsibility to those whom I meet in social life, to the House of Commons, where I have and shall again pledge all that I have worked and laboured for during twenty years on the strength of my convictions—is that fact, if fact it be, known to the Attorney-General? Has it been known to him throughout this prosecution? Is it known to Her Majesty's Government or to Mr. Gladstone, or, which is the same thing, have they given 100,000*l.*, or whatever other money they have given, out of your pockets, have they given that money to prosecute this man and to convict him of offences without taking the ordinary and proper means at their command for ascertaining the fact whether he be really guilty of perjury or not?"

And again:—"I have charged the Tichborne family, I have charged directly and in print the Doughtys, the Radcliffes, and the whole lot of them together, with knowing that he is the man, and combining in a conspiracy against him. (Loud cheers.) Now, ladies and gentlemen, you will naturally say how can we listen to such a Don Quixote as that? What a fool that man must be to throw himself into a quarrel that in no manner concerns him, merely as to the question whether this gentleman or somebody else is entitled to certain estates in Hampshire, and here it is, ladies and gentlemen, that I come to the real question that concerns you and me and the hundreds of thousands of men that I have addressed throughout the country. Here we come now to the public question. Gentlemen, the time has not come when either I should be justified in speaking or you would be prepared to listen to those possibilities of conspiracy in a matter of this kind, which I do believe, it is my hope, my expectation, the very object for which I exert myself in this case, will in due time become more fully developed and understood by the people of this country. What is the nature of this conspiracy? What is the origin? What are the grounds on which, six years ago, these people met in a drawing-room in London, and said we will defy the laws of England, we have these estates, here is the man, it is not expedient that this man should have these estates, we will keep them, we are strong enough in Parliament, strong enough on the judicial bench, strong enough in society to defy the laws of England. (Cheers.) Gentlemen, I am not prepared to enter into that to the extent I feel it. I say that I live in the hope that the time will come when it will be quite legitimate to address you on the nature of that conspiracy against Sir Roger Tichborne which I state here to night, in accordance with a challenge which I gave three months ago at the last public meeting in London, in Oxford Hall, to this effect—That I should be prepared to meet the Attorney-General or any of the six counsel most eminent at the Bar, or any other advocates that he might

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put forward, and to satisfy any intelligent London audience that it was not consistent with the facts of this case, as I should present them to you, that he did not know throughout that trial that he was prosecuting that the claimant was Sir Roger Tichborne, and that he and the Government afterwards, at his advice, do now at this moment know, or that they have the means of knowing, that it is so ; that in sustentation of their conspiracy for the purpose of retaining these large estates in the hands of the Arundel family, the leading family, as we know, in a certain influential circle of society—for the purpose of retaining these estates in that family, and sustaining the whole course of their conduct from first to last, that they do know, or, as I say, have the means readily of knowing, that they are attempting to prosecute to conviction, to penal servitude, or again to Newgate, a man whom they know to be innocent of the charge brought against him.”

Mr. Onslow afterwards made a long speech at the same meeting, of which the drift was to urge the audience to make subscriptions for the defence, and in the result Mr. Whalley moved a resolution:—“That this meeting declares its opinion, in common with the country at large, that the prosecution of the claimant at the public cost was uncalled for, and, in the absence of explanation, which had been refused, wholly unjustifiable, and demands public reprobation ; and that the support and sympathy of the British public are justly due to the claimant. This resolution was carried.”

Upon the reports of these speeches, verified by affidavit, *Hawkins*, Q.C. (with him *Bowen*) had on behalf of the Crown moved for and obtained the summonses herein. Both gentlemen now appeared in court accordingly.

Sir *J. B. Karlake*, Q.C. (with him *A. L. Smith*) on behalf of Mr. Onslow, read an affidavit filed by him, in which he stated, among other things, that for many years of his life he lived on terms of intimacy and friendship with the late Sir James Tichborne and Lady Tichborne, his wife, and upon the death of the latter he attended the funeral at Tichborne Park. Sir James Tichborne and he were natives of the same county, and they saw a good deal of each other at different times. After the arrival of the claimant in this country in 1866 he became acquainted with him, and was in communication with Lady Tichborne on the subject of his identity, and he knew from her that she identified him as her firstborn son, the issue of her marriage with Sir James Tichborne, and as far as he could judge, he believed she had no doubt whatever on the subject. He was earnestly entreated by her ladyship before her death not to abandon or desert her son, the said claimant, and he faithfully promised that he would never do so, and, honestly believing, as he had always done and still did, that the person identified by her is her son, he had endeavoured to the best of his ability and power during all the proceedings in the Court of Chancery and

in the Common Pleas, to assist him in establishing his claim to the title and estates. It is a matter of notoriety, he said, that, ever since the claim was first made by the claimant to the present moment, his identity has been made the topic of conversation and discussion among all classes—in the House of Commons, in the clubs, in society, and in almost every part of the kingdom: and finding that the result of the trial had had the not unnatural effect of creating a very strong prejudice against the claimant (the greater because many statements which had been made, but not proved by witnesses, were assumed to be true), he did attempt to counteract the feeling of prejudice, with the view and object, so far as he could attain them, of preventing the result of the trial from operating unjustly against the claimant in the criminal proceedings taken against him. After the release of the claimant from prison (Lady Tichborne, from whom during her life he received 1000*l.* a year since his return, having died) the claimant was wholly without funds to meet the expenses of his defence. He attended meetings in parts of the country with the object of obtaining funds for the purpose of defraying the expenses of his trial. The meetings of the 11th of December and the 12th of December, 1872, mentioned in the affidavits filed upon obtaining the rule in this case, were meetings called for such purpose as aforesaid. In the observations which he made, his desire, intention, and object were to counteract the feeling of prejudice existing against the claimant, so that he might, if possible, go into court to meet his trial for the criminal offence alleged against him unprejudiced by the result of the trial at *Nisi Prius*, and the comments which had been made upon him in the course thereof. He said that although now it was obvious to him that such observations, made with the sole object and purpose aforesaid, might be considered to have the effect of reflecting upon the character of witnesses and the conduct of the prosecution, it did not occur to him that such was or might be the effect. He had not the slightest intention of prejudicing or interfering with or preventing the course of justice, and it was with great regret that he had taken a course unwittingly which could be looked upon as indicative of having ever entertained any such intention. The affidavit thus concluded: "I repeat that at the time I made the observations complained of I had no intention whatever of interfering with the course of justice in the trials which are now pending. I made such observations under the circumstances and with the objects only above stated by me. As soon as I read the report in the public papers, of the motion to this honourable court, I saw that I had been betrayed into taking a course which laid me open to the imputation of having, in trying to remove prejudice operating against the claimant, created prejudice against the prosecution, and thereby, pending a trial, improperly commented upon matters connected with it; and I desire to express my unfeigned regret at having taken such a course, and to apologise in all sincerity to this

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honourable court for the conduct for which I am arraigned." So far as the counsel had been able to look into the subject, he found, he said, that where a matter was actually pending in a court it had always been deemed improper to comment upon the evidence which was or would be given on the hearing; and that if the effect of the comments were or might be to reflect upon the administration of justice, or to prejudice the fair trial of the case, then there was technically a contempt of court. In the present case the proceedings, no doubt, were so far pending that indictments had been found against the claimant which were standing for trial in this court; and so far as he could form an opinion from the authorities (though there was no express authority precisely in point), it might be considered that the proceedings were pending. If, however, he should be wrong in that view, and if in point of law the case was not pending, he hoped his admission would not prejudice the case of Mr. Onslow. The course he proposed to adopt, and which had been suggested to him by Mr. Onslow rather than suggested by himself to his client, was to explain the circumstances under which that gentleman came to use the words complained of, and this he had done in his affidavit. He desired to urge that from the course the trial of the action had taken, it had come to a close before the evidence had been fully gone into, and many things had been stated by the Attorney-General which, it was believed by his client, would not have been capable of proof, and Mr. Onslow had made his comments under the impression that the case, had it been concluded regularly, would have turned out very differently. No doubt, however, in the course of Mr. Onslow's speech, allusions were made to the coming trial, and he felt bound to admit that there were observations made which technically amounted to a contempt, inasmuch as they might tend to prejudice the fair trial of the case. Therefore they would come within the rule he had adverted to, assuming that the court would be of opinion that the case was pending. [COCKBURN, C. J.—On that point we entertain no doubt.] That being so, of course the case would come within the principle of several recent decisions in the Court of Chancery on this very case, with reference to observations in the press. And he expressed on the part of Mr. Onslow his regret that he should have been betrayed into these observations. [COCKBURN, C. J.—There is a question, Sir John, which I think it proper to put, and which is important, Are we to understand that Mr. Onslow, in expressing that regret, which has been so happily expressed by you on his behalf, intimates to the court his clear intention and resolution not again to take part in any such proceeding?] Most undoubtedly; and he made that statement at Mr. Onslow's direction.

Digby Seymour, Q.C. (with him *Morgan Lloyd* and *Macrae Moir*), on behalf of Mr. Whalley, read an affidavit, in which that gentleman entered at great length into the facts of the ejectment. The affidavit concluded as follows: "And I further say that I attended

the said meetings with the sincere and honest conviction that the same were lawful public meetings, convened for a legitimate object, and that I had a full right to discuss the matters contained in the speeches delivered by me at such meetings. It never occurred to me that anything said at the said meetings would unduly influence the jury that might be empanelled to try the said indictments, nor in any other way prevent a fair and impartial trial." The counsel observed that he was not aware of the course which was to be taken by Sir J. Karslake, who had acted without any communication or concert with him; and while he fully concurred with him in the language he had employed, he felt it his duty to point out to the court that there was this distinction between the present case and any other, that here the parties were commenting upon a former trial which was concluded. [COCKBURN, C. J.—But with attacks upon the conduct and character of witnesses who were to be called again as witnesses. LUSH, J.—He suggests that what they had done once they would be likely to do again.] Mr. Whalley states that his only object was to promote an appeal on behalf of the defence. [COCKBURN, C. J.—But if the obvious effect was to prejudice the fair trial of the prosecution, the purpose would not be material.] It might be material in a case of mere constructive contempt such as this. In all the other cases there had been attacks upon particular witnesses in a trial or hearing still pending. [COCKBURN, C. J.—So there are here, for particular persons who are expected to be called as witnesses are charged with perjury.] This was explained as having reference to the former trial. [COCKBURN, C. J.—The question of identity being the same in the civil as in the criminal trial, those witnesses who gave their evidence in the former trial against the claimant would be called again in the ensuing trial to give their evidence against him. If the meeting had been convened only for the purpose of providing funds for the approaching trial, perhaps that might not in itself have been reprehensible. But if, speaking with reference to the approaching trial, those witnesses who it is known will be called to give evidence are denounced as conspirators, and as intending to give perjured evidence—is it to be doubted that this is a contempt? Is not this the test? Suppose a person afterwards called as a juror on the coming trial had been present at the meeting and heard these persons charged as perjured conspirators, would it not have been calculated to prejudice his mind?] If Mr. Whalley used language tantamount to that he could not of course vindicate it; but he denied that he had any idea of his language having such an effect. He was stating his reasons why persons should subscribe to the defence. That takes it out of the charge as to contempt. [BLACKBURN, J.—That is quite contrary to the law, as I have always understood it.] In all the previous cases on the subject there had been attacks upon witnesses for their evidence on the very proceedings then pending; for instance, in the Chancery cases there had been attacks upon

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persons who had made affidavits in the case being heard. Surely there is a broad distinction between those cases and the present? [MELLOR, J.—Even if there had been no direct allusion to the coming trial, can any man doubt that the statement that the witnesses in the former trial were in a conspiracy to deprive a man of his estates by means of perjury, would have had an effect upon the public mind as to the coming trial, in which, of necessity, the question would be the same and the witnesses must be the same?] Mr. Whalley had a lawful object in view, in the course of urging which he had fallen into the use of this language. His object was only to promote subscriptions for the defence. [BLACKBURN, J.—I have no doubt in all the cases of newspaper contempts which have occurred, the object was not to do injustice, but to promote the sale of the paper; but has that ever been considered an excuse? LUSH, J.—Can any motive excuse the assertion at a public meeting that the witnesses on a coming trial are in a conspiracy to commit fraud by means of perjury?] He commented upon the evidence they gave at the former trial in order to show that they were combined together to defeat the claimant. [LUSH, J.—With a view to show that they were likely to give false evidence on the coming trial.] Not necessarily so. They might or might not be called at the next trial. These remarks might be the subject of a criminal information. [BLACKBURN, J.—But even if so, it is no reason why a party should not be prosecuted for a contempt.] It might be a reason why the Court should not interfere summarily for a contempt that there was a remedy by way of criminal information. [MELLOR, J.—If Mr. Whalley had confined himself to pointing out the great odds against the claimant, arising from the wealth and social position of the family opposed to him, and had urged this as a reason for assisting him with subscriptions, avoiding all calumnious imputations upon those who were against him, his case would have been very different, and I should have felt very reluctant to visit him with any penalty. But he has not been content with this, and has imputed to the witnesses against him that they were in a conspiracy to defeat and convict an innocent man by means of perjury.] His object, however, was legitimate. [COCKBURN, C.J.—The motive or the object could not excuse a contempt of court. BLACKBURN, J.—Unduly to interfere with a fair trial is not the less a contempt because it is done to get subscriptions for one side.] This is a “constructive contempt,” and is, therefore, to be regarded with some jealousy. [BLACKBURN, J.—Where is the distinction between an actual contempt and a “constructive” contempt?] The distinction is very obvious: one is a direct attack upon the Court, and the other is only an indirect attack upon some of the parties or witnesses. [BLACKBURN, J.—Lord Cottenham said in *Mr. Lechmere Charlton’s case* (2 Myl. & Cr. 316, 342), “It is immaterial what means are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the

ordinary course. It is a contempt of the highest order.”] That was a very different case from the present. But even adopting that definition here, that was not Mr. Whalley’s object. This was a constructive contempt and a novel case, and would carry the doctrine of contempt further than any case which has yet occurred. Mr. Whalley disclaimed any intention to pervert the course of justice, or interfere with a fair trial; and if he had been guilty of a contempt, it had been unwittingly, and in the conscientious discharge of what he believed to be a public duty. He apologised to the Court, and promised not to attend any such meetings in future.

Hawkins, Q.C. (with him *Bowen*) appeared for the prosecution, and read extracts of the speeches made at the public meetings. He left the matter in the hands of the Court.

COCKBURN, C.J., addressed Mr. Guildford Onslow and Mr. Whalley.—I have to express the unanimous opinion of the court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) that in the proceedings set forth in these affidavits to which you have been called upon to give an answer you have been guilty of a gross and aggravated contempt of the authority of the court. We are far from saying that when persons believe that a man who is under a prosecution on a criminal charge is innocent, they may not legitimately unite for the purpose of providing him with the means of making an effectual defence; and any expressions intended only as an appeal to others to unite in that object, though, perhaps, not strictly regular, would not be fit matter for complaint and punishment. We quite agree that it would be harsh and unnecessary to interfere with the expression of opinion honestly entertained, and expressed only for a legitimate purpose. But it is no excuse to urge when—at a meeting held for the purpose of providing funds—language is used which amounts to an offence against the law—and a contempt against the court—that the motive or the purpose for which the meeting was held was justifiable. And when we find that at a former trial the jury before whom the claimant gave his evidence declared that they disbelieved that evidence, and that the learned judge who presided at the trial directed his prosecution, and that a grand jury—the proper and constitutional tribunal—have found true bills against him on the serious charges of forgery and perjury—that such a man should be paraded through the country and exhibited as a sort of show at public assemblies as the victim of injustice and oppression, and that at these meetings—in violent and inflammatory language—witnesses who had given evidence against him on the former trial should be held up to public odium as having been guilty of conspiracy and perjury; that the counsel engaged against him, and even the judge who presided at the trial, should be reviled in terms of opprobrium and contumely; and, what is still more immediately to the present purpose, that the events of the pending prosecution should be discussed, and the evidence assumed to be false; and that all this should occur, not merely in the provinces, but in

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the metropolis, almost in the precincts of the court, and within the very district from which the persons are to come who are to pass in judgment between the Crown and the accused in the coming trial—how can we shut our eyes to the fact that there is here an outrage upon public decency and a great public scandal, and that the even and ordinary course of justice has here been unwarrantably interfered with? This court, therefore, cannot, under such circumstances, hesitate to exercise the authority which it undoubtedly possesses, for preventing the public discussion of any trial pending in the court. It has been attempted to be contended on your behalf that the meetings in question were convened solely for the purpose of obtaining money, in order to enable the accused to carry on his defence, and with the additional purpose of removing any prejudice which the result of the former trial may have produced against him. But that can be no excuse if the language used amounts to an unwarrantable interference with the course of justice. And when we find that gentlemen of your station and position, gentlemen of education, members of the Legislature, have condescended to lend themselves to proceedings of this character, and to hold such language as you have used on these occasions, we can only contemplate your conduct with astonishment and regret. When it is said that all this was done without any consciousness that it was an offence against the public justice of this court, though it must have the effect of creating prejudice with reference to the approaching trial, I can only accept that apology as really derogatory to the understanding of those who make it. There cannot be the slightest doubt in the mind of any sensible man that such a course of proceeding must interfere with public justice. It is open to those who take the part of the accused to discuss in public the merits of the prosecution in his interest; then it must be equally open to those who believe in his guilt to take a similar course on the other side. And then we may have, on the occasion of a political trial, or any case exciting great public interest, an organized system of public meetings throughout the country, at which the merits or the demerits of the accused may be discussed and canvassed on the one side and the other, and thus, by appeals such as you have not hesitated to make to public feeling in this case, the course of public justice may be interfered with and disturbed. It is clear that such comment upon a proceeding still pending is an offence against the administration of justice and a high contempt of the authority of this court. Nor can it make any difference in point of principle whether the observations are made in writing or in speeches at public meetings, and we can have no hesitation in applying to the one case the same rule as to the other. We think, therefore, that the counsel for the Crown have done no more than discharge their duty in bringing this case under our notice; and we must deal with it in such a way as to repress, if possible, such improper proceedings in future. We are glad to find that on this occasion,

though attempts have been made to distinguish this case from others in which the court has interfered in the exercise of its summary authority, yet both parties have, through their counsel, submitted themselves to the court, and have given a clear and distinct pledge that they will take no part in such objectionable proceedings again. If there had been any hesitation in giving such a pledge, or the slightest appearance of it, and if there had not been the most submissive attitude assumed, the court would have thought it necessary to use to the full extent the power and authority it possesses, and would have inflicted a substantial fine and also a sentence of imprisonment in addition. We are happily spared the necessity of taking the latter course in consequence of the very proper line you have both of you adopted. But we wish it to be understood that in the fine we are about to impose we have gone to the extreme of moderation, and that if on any future occasion proceedings of this kind shall be resorted to, the full power of the court, which it immediately possesses to restrain and prevent such proceedings by the infliction of adequate punishment, will be certainly inflicted with a stern and unhesitating hand. The mischief in the present case, so far as the positive effect of these proceedings is concerned, has been very trifling indeed, thanks to the good sense of the metropolitan press in forbearing from giving publicity to these offensive and objectionable proceedings. But your intention was not the less reprehensible, nor your conduct the less open to severe censure. However, under all the circumstances we think that, considering the position you have taken and the pledge you have given, a pecuniary penalty of moderate amount—moderate with reference to the circumstances of the case and the aggravated character of the offence you have committed—will satisfy the exigencies of the case. But that leniency which we now exercise will be appealed to in vain if any other person shall be found guilty of a similar offence. The sentence of the court upon you is that for this contempt you do each pay a fine of 100*l.* to the Queen, and that you be imprisoned until the fine be paid.

Upon consulting the other judges, the LORD CHIEF JUSTICE almost immediately added:

To persons of your position it is not necessary to apply the latter part of this sentence. The sentence of the court, therefore, is that you do each pay a fine of 100*l.* to the Queen.

Jan. 21.—COCKBURN, C. J. to-day made the following remarks with regard to this matter:—I find that an impression has gone forth that, in remitting that part of the sentence pronounced yesterday which imposed imprisonment until the fine was paid, I was influenced by the anticipation of some difficulty as to the imprisonment of members of Parliament by reason of some privilege which members of Parliament possess. This is an entire mistake, imprisonment being only imposed as a means of insuring payment of the fine. I was reminded by my brother Blackburn that payment might be enforced without having recourse to im-

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prisonment, and it at once occurred to me that it was unnecessary—looking to the position of these gentlemen—that imprisonment should be imposed until the fine was paid, especially as there were other means of enforcing payment. On that ground alone, that part of the judgment was recalled. I had intended to intimate in the judgment which, with the concurrence of the court, I pronounced, that if in the case itself there had not been a perfect submission to the court on the part of the defendants, and the clearest and most positive pledge that there would be no renewal of the conduct complained of, the sentence of imprisonment would have been added to the pecuniary penalty. The possibility of any collision with the House of Commons had not appeared to us as ever likely to occur, especially as in the case of Mr. Lechmere Charlton, who was committed by order of the Court of Chancery, the House of Commons declined to interfere on behalf of the privilege of their members; and I am sure that the House of Commons would not desire to interpose the privilege of its members to prevent punishment by imprisonment for a contempt in the administration of justice. I was anxious that there should be no misunderstanding on a matter of such importance as this, and, therefore, I have thought it necessary to correct an impression which seems to have prevailed as to the grounds on which we proceed in remitting that part of our judgment to which we have referred.

Attorney for the prosecution, the Solicitor to the Treasury.

Attorney for Mr. Onslow, *E. Bromley*.

Attorney for Mr. Whalley, *F. Moojen*.

COURT OF QUEEN'S BENCH.

Wednesday, Jan. 29, 1873.

(Before BLACKBURN, MELLOR, LUSH, and QUAIN, JJ.)

REG. v. SKIPWORTH.

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It is a contempt of court, while a criminal charge is pending, to impugn the honesty and impartiality of the judge by whom it is to be tried, or to attempt to obstruct the course of justice by exciting public prejudice against it.

But it is not a contempt merely to solicit subscriptions for the defence of a defendant on a criminal charge.

THIS was a motion for the committal of the defendants for contempt of court. Defendant, De Castro, was the claimant of the Tichbourne estates in an action which, after a protracted hearing, terminated in a nonsuit, and the plaintiff was committed for trial upon a charge of perjury, which was appointed for trial at bar. In the meanwhile the defendant and his friends, of whom the other defendant Skipworth was one, had held meetings in various parts of the country, to excite sympathy for his cause and collect funds for his defence. After the hearing of the case against Onslow and Whalley (*ante*, p. 357), a meeting was held at Brighton, at which the defendants were present, Skipworth taking the chair, and speeches were made by them which were the subject of this complaint, taken in conjunction with other speeches previously made at other places.

On the application of counsel for the prosecution of De Castro, the court had made an order for the immediate attendance of the defendants and they appeared now in pursuance of such order.

The affidavits on which the charge of contempt was made were read at length. It will suffice to give the more important portions of them. The first read were the verbatim reports of the speeches of the defendants at the meeting at Brighton, which was the main subject of the complaint. The defendant Skipworth was reported to have spoken thus, *inter alia*:—
“Ladies and gentlemen,—It is encouraging to find your reception after the degrading spectacle I may say I have witnessed at the Queen's Bench to-day in London. (Hear,

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hear.) Nothing less than this—that two honourable members of Parliament have been brought up, I may say as criminals, for advocating truth and justice throughout the country. ('Hear, hear,' and applause.) Yes, gentlemen, I say a sad spectacle it is for England that we have come to this—no less than a great infringement upon our rights and liberties (hear, hear); and if they had a just cause upon the other side you may depend upon it it would never have been done. ('Hear, hear,' and a cry of 'Never.') And what do they mean when they rob a man of everything he possesses, while he has to go about the country for a living?—they would even rob him of every friend he possesses. (Applause.) Gentlemen, I went into that court—I am a perfect stranger, no doubt, to you here—I live a long way off, and I would go a long way to advocate the cause of my friend Sir Roger Tichborne (applause)—I went, gentlemen, into that court to-day, and I donned my wig and gown, that had lain up for above twenty years, in order to support the cause of my friend Sir Roger Tichborne. (Applause.) I live quietly on my estate in Lincolnshire—I have my home, I have my family and my affairs to attend to, but when duty to my country calls me forth, and when I see such degradation as I witness throughout the land—(hear, hear)—yes, these honourable members of Parliament have been brought up, have been treated as criminals, have had to apologize in the most degrading way, I may say, and have been fined for doing their duty to a fellow countryman. ('Hear, hear,' and applause.) Gentlemen, I was the chairman at that meeting in St. James's-hall, where their conduct has been called in question. The Lord Chief Justice of England particularly stated in his judgment how mild and moderate he was to these gentlemen, inasmuch as they had apologized in that way, but it was only an example, and that if any one else should similarly offend, or be brought up under similar circumstances, they would be visited with the full rigour of the law—not only a fine would be inflicted, but imprisonment. (Cries of 'Shame,' and hisses.) Gentlemen, I hurl his intimidation back with the contempt that he has treated these members of Parliament. (Loud applause.) I care not for his intimidation. I will stand here when my duty calls me in defiance of his—ay, I will call them vulgar—threats. (Renewed applause.) I am not going to be intimidated when I consider that a duty to my country calls me forth. I have a conscience and that conscience I wish to satisfy. I could see very well there was no chance of any justice being done by these four judges from the first. It was like appealing to stone walls. I could see that their minds were all made up from the first, and that a conviction they were determined to make. (Hisses and applause.) And what is this but to prevent public free discussion in the country—what we have boasted of as hereditary, as it were, for centuries; and now we are to be put down above all things when truth and justice are advocated. If it was something demoralizing to the

country that was to be put down there would be something in it ; but you will I am sure answer that when you all assemble here together it is for a good purpose—you wish to know the truth of this great mystery that has been going on for so many years. (Applause.) Surely it has gone on long enough. Here these six or seven years has it been going on, and this gentleman has been up and down the country and still he is not acknowledged by his name and title. It is a disgrace to the country ! And if they know, as I know, as well as I stand here and have known long ago, that he is Sir Roger Tichborne, how can they plead ignorance, those people who have had the affair in their own hands ; they have had the affair in their own hands from the first, six or seven years ago. Why, they must be the most perfect idiots in the world if they don't know now and have done long since. (Applause.) Could a trial like that go on for all that time and all that talent employed—the judges, the counsel, and all concerned—and not know the real state of the case ? And so these gentlemen, these two gentlemen, are to be brought up and sentenced to pay a fine and be threatened with imprisonment ; they are to be stopped speaking, and the whole press of the country is allowed to be against Sir Roger Tichborne. (Hisses.) Why don't they take up his case if they wish to do justice ? Why is he to be scurrilously treated, I may say, by hundreds of papers in this country ? They almost seem to encourage it by their very silence. What are we to consider of the press of the country who will put down a fallen man, as it were, as they do—what are we to consider ? Why, they must be hirelings of the Government—nothing more or less. There are some exceptions, and I hope you have some of them here ; for it is a very hard thing indeed to find an honest report of any of these meetings at all. I can only say that had I been the one charged to-day, I would have cut my hand off before I would have acknowledged I had been in error and humbly apologized where there was nothing to apologize for. (Cheers.) They should have sent me into a prison dungeon before I would have acknowledged anything that was untrue. I think the prison cells would be a paradise nearly to the polluted atmosphere in which we seem to live. For what is our country if we cannot boast of it as a country for right and justice ? (Hear, hear.) What is a man's property worth if he cannot secure it by proper right and title ? I can only say that it comes to this :—If this is Sir Roger Tichborne, as he undoubtedly is, it cannot be anything more than a conspiracy which keeps him out of his estates. But I consider that Lord Chief Justice Cockburn was not a fit person to try anything in connection with the claims of the Tichborne estate. (A cry of 'Shame,' and hisses.) I am sorry to say he has long since so prejudged that case, which disentitles him to sit as an impartial judge (hisses) when the title is concerned. (Renewed hissing and some applause.) Yes, sir, you may hiss, but I hiss at the Lord Chief Justice."

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The speech of the defendant, De Castro, was thus reported :
 “ Four years ago the Lord Chief Justice of England publicly denounced me as a rank impostor at his club. I know of others (occasions), but cannot prove them, so will not. But I can prove that he subsequently, within these last two months, at a party where a lady friend of mine was, distinctly turned round in a very angry manner to those ladies, and said it was a disgrace to mention my name in decent society.. (‘ Oh, oh !’) I think I have a right to call on him to answer for contempt of court. I do not suppose they would grant the rule, but rest assured I will apply for it. And I maintain, ladies and gentlemen, that he had no right to sit on that bench (to-day.) At St. James’s Hall my friend Mr. Onslow stated that the Lord Chief Justice was not a fit justice to sit on my forthcoming trial. He gave as his reasons those I have mentioned, and that he had also, during the late trial, while sitting by the side of Judge Bovill, written on a piece of paper—‘ Had I been judge and you leading counsel we would have had this fellow in Newgate long ago.’ He was a party concerned, and if he had had the slightest delicacy for his honour he would never have sat on the bench (to-day). So much have I heard that I intend to petition Parliament against his sitting on my forthcoming trial. No doubt I shall be able to prevent him. If I do not I will go into that court without counsel, attorney, or witnesses, and let him crush me as he thinks proper.’ (‘ No, no.’) If the Lord Chief Justice has got to sit and adjudicate on my case I will offer no evidence, but throw myself on the country.”
 (Applause.)

De Castro filed no affidavit in answer.

Skipworth filed an affidavit from which the following is an extract : “ The meetings complained of were given out to be called for the purpose of raising money for the Tichborne Defence Fund, but I did not attend them on that account alone, but for the purpose of enlisting sympathy in the case. At these meetings no improper language was used, except under excitement caused by hostile interruptions. The meetings took place, too, by reason of the enormous interest taken in the case throughout the country, and often upon invitation and at the express desire of respectable persons. And all these meetings were unanimous in declaring a belief in the claimant.

“ I have had no other object than to promote the cause of truth and justice. If I have made any improper statements—of which I am not aware—it has been through inadvertence, and not intentionally. The remarks I have made upon any of the judges or law officers of the Crown were meant in the way of honest comment and fair criticism upon their public acts and conduct. I had not the slightest intention of bringing the court into contempt, but my sole object has been to uphold the interests of justice, which I believed to be in jeopardy.”

Mr. Skipworth went on to say that he was in court, and heard the sentence passed on Mr. Onslow and Mr. Whalley ; and he

thought that under the circumstances there had been a degradation and dishonour to the law which he felt called upon to protest against. "The remarks I made" (he said) "at the Brighton meeting, as to the Lord Chief Justice not being a proper judge to try the case, were based upon notorious and well-known facts, he having repeatedly denounced the claimant as an impostor;" and on this account, Mr. Skipworth said, "I considered it improper that he should preside." "I put it to the meeting, not in the spirit of aspersion or contempt, but as an observation fairly called for by the position of the case; and, though I was excited by a hiss to say 'I hiss the Lord Chief Justice,' that expression escaped me on the spur of the moment; and, being sensible upon reflection that the expression was improper, I withdrew it. But I cannot forego my right to comment upon the conduct of a judge with reference to a case before him. With regard to the charge of attending this particular meeting, I must say that though I was not bound by the submission and the pledge given by the two members of Parliament, I avow that I attended that meeting in defiance of the threat held out by the court, and that it was with the distinct intention of setting that threat at defiance; for I considered that such a threat ought not to have been uttered from the bench, and it was my object to prevent the stigma and reproach attaching to the country of our being a nation of cowards, and to show that there was at least one man who had a spark of public spirit in his breast sufficient to inspire him to resist the attempt made to extort pledges—which there was no legal right to exact—not to attend meetings admitted to be lawful." In conclusion, Mr. Skipworth submitted that he could not but consider the course now taken against him unjust, cruel, and oppressive.

After this various letters and publications of his on the subject were read. One was a letter to the Queen, which, of course, had only a dry official acknowledgment from the Under Secretary, then a letter to Mr. Gladstone, and then one to the people of England. These documents commented in strong terms upon the conduct of the civil trial, and on the course taken by the Government in adopting the prosecution of the claimant. They contained some startling statements, as that during the trial the Attorney-General was seen with his arm round Mr. Serjeant Ballantine's neck whispering in his ear—a statement which excited roars of laughter. Another statement was that Mr. Gladstone said to the Attorney-General, "Whatever happens, mind we don't fail in the Tichborne case"—a statement which excited similar peals of laughter.

After these documents were read, Mr. Skipworth, being called upon for any further defence he had to offer, rose up and said,—“My Lords, if upon these statements you commit me for contempt of court, all I can say is that I throw myself upon my country and my God!” He then sat down.

De Castro was then called upon for his answer. He said,—I am not aware that I have committed any contempt, and if I have

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done so it was not my intention ; but I submit that the charge ought to be tried by a jury ; before them I could prove what I have stated to be true.

BLACKBURN, J., intimated that in a proceeding for contempt the matter was tried by the court.

De Castro.—Then, you decide that you are to try it yourselves ?

BLACKBURN, J.—Such is the course.

De Castro.—But, you see, I am charged with contempt in complaining of the Lord Chief Justice, and you are his colleagues. It is not fair that you should try it without a jury.

BLACKBURN, J.—To use any argument upon that point would be without avail. It has long been settled that an attempt to interfere with the course of justice is a contempt of court. It is too late to dispute that.

De Castro.—But am I to have no opportunity of proving that what I said was true ?

BLACKBURN, J.—You are not charged with a contempt in the sense of having insulted any member of the court, but with an attempt to obstruct the ordinary course of justice, and using undue influence to prejudice a trial.

De Castro.—I have not used any undue influence to prejudice the coming trial ; it was with reference to my late trial, and especially to the attacks of the Attorney-General, from which I had a right to defend myself. Besides, great injustice has been done to me in every way. The Government took up the prosecution, and their Attorney-General had previously been counsel against me, and applied the strongest language to me, using such epithets as “conspirator,” “perjurer,” “forger,” and “impostor.” And at the trial, as the case was stopped, my counsel was not heard in reply, so I had a right to reply before the public. Besides, all the papers were against me, except the *Morning Advertiser*, and they were continually making attacks upon me. Your Lordships will say, probably, that I could have brought them before the court, but without funds I had not the means of doing so, and the Government had any amount of money at their disposal. Why, only last Saturday, while the matter was pending, there was an article in the *Saturday Review* heaping the foulest abuse upon me. Is that fair or just, my Lords ?

BLACKBURN, J.—As you appeal to us, we are bound to answer you, and to say that we think it is not just, and that we entirely agree with you in thinking that it was a most improper article, for the very reason you are now brought before us to answer for what you have done, and we only hope no one will offend again.

De Castro.—But what I want to urge upon you, my Lords, is that, as these publications were coming out against me ever since I was committed for trial, I had a right to meet them in the only way I could—by going about the country and addressing public meetings in my defence.

He then went on to read articles in which he had been attacked, and urged that as his counsel had not been heard

in reply, he had no other means of meeting these attacks than speaking at public meetings. Therefore it was, he said, that he had gone from town to town trying to meet and to answer these charges, and to appeal to his fellow-countrymen against the attacks of the press. He urged that he had a right to do so, and that the court had no right to interfere with him. He urged, again, that this was the more just because his trial had been put off for twelve months in order to enable the Government, with all the aid of the Government funds, to get up a stronger case against him by means of advertising for evidence and other methods in Australia. He urged, further, that these meetings had been going on for many months without being in any way objected to, and had lately been brought before the Court of Chancery without any objection. He urged, again, that when, in 1870, he brought the *Echo* before the Court of Chancery for prejudicing the case before the hearing and before the trial, the Vice-Chancellor let them off with payment of their costs, and he had to pay his own. After that, of course, he made no further attempt to obtain redress in court, and now he was charged with "contempt" of court because he tried to get redress by appealing to the public himself. He had attended eighteen of these meetings, and had held at all of them the same language, and had never been interfered with before in any way. He protested that he had only asserted the right of a free-born Englishman in defending himself; and he urged that had the Government done their duty and behaved fairly he would never have been driven to this. Finally, he appealed to the court, on the ground that if they sent him to prison or inflicted a fine which he could not pay they would prejudice his defence in the prosecution now pending against him, and deprive him of the means of making his defence.

Hawkins, Q.C., briefly addressed the court, observing that as to Mr. Skipworth he had desired only to place the matter before the court, and that as to the claimant he had not desired to take any step at all, and that he now left the matter entirely in the hands of the court.

BLACKBURN, J. (the Court having consulted), said,—These persons have been called upon to show cause why they should not be committed for contempt of court, and the first question is whether they have been guilty of a contempt. The word "contempt" has caused persons who are not lawyers to suppose that it means a proceeding to protect the personal dignity of the judges from insult to them as individuals, and sometimes, no doubt, persons have been committed for such personal attacks, although, so far as their protection as individuals is concerned, that is a subordinate object, and the cases are very rare in which the judges would consider it worth their while to interpose on that ground. But there is another and more important object for which it may be necessary to interpose. Any case which is pending, either in a civil or criminal court, ought to be tried in the ordinary course

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of justice, and in the present case there is an indictment against one of the persons before us which is now standing for trial. That case ought to be fairly tried ; but it may happen that proceedings occur such as have now called upon us to interfere. Sometimes the course taken has been by attacking the judge ; sometimes by attempting to induce him to alter his opinion or to take a course different from that which he would otherwise take ; more commonly, there is an attempt to influence the trial by attacking the witnesses or appealing to public feeling so as to prejudice the trial. In all these ways, great mischief may be done, interfering with the due and ordinary course of justice. When the attempt is by an act which is itself punishable, as conspiracy, libel, or assault, the party might, of course, be indicted for it ; but the prosecution, though sufficient for the purpose of punishment, might be made greater for the purpose of prevention ; the mischief might be done, and the administration of justice would be perverted or prejudiced. For that reason, from the earliest times, the Superior Courts of Law and Equity have exercised the jurisdiction of prosecuting such attempts by summary proceedings for contempt, and having that power, it is our duty, when the occasion arises, to exercise it. In the present instance, as Mr. Hawkins has stated, he did not desire to proceed against the defendant ; but we thought that as there had been an attempt to interfere with the course of justice, it was our duty to interpose against him, and we, therefore, ourselves, ordered him to attend. And I am bound to say that he has defended himself here with great propriety, and, making allowance for the want of legal knowledge, he has taken every point in his favour which the ablest counsel could have done. Nevertheless, he has not succeeded in showing us that he has not been guilty of a contempt. He has urged that the matter ought to be tried by a jury, but the question is not now whether he is innocent or guilty on the indictment on which he will be fairly tried hereafter. The attempt to prejudice the trial is the offence with which he is now charged. We are not to inquire whether what he has stated be true or false, but whether the course he has taken be such as to show that he intended to influence the trial and prejudice the question by appeals to public feeling. All such attempts amount to contempt of court, and we hardly think it necessary to cite any authorities on the point. We need only mention one. (The learned judge here cited the case of Mr. Charlton (2 Myl. & Cr.), where that gentleman, while his case was being heard before the Master, wrote to him an insulting and threatening letter, for which Lord Cottenham committed him, saying, " The power of summary committal for contempt is given to the courts to secure the due administration of justice," and going on to show that the case was one which called for its exercise.) Lord Cottenham, after citing authorities, said in that case, " All the authorities tend to the same conclusion ; and wherever the object is to taint the course of justice and to obtain a result different from that which would

follow in the ordinary course, it is a contempt; and though such an attempt here has not had any effect, yet if such attempts as this were not punished, the most serious consequences would ensue." These words indicate the kind of contempt which has been attempted in the present instance, where there has been an attempt by means of vituperation to deter the Lord Chief Justice from taking any part in the trial, and also by attacks upon the witnesses themselves, to influence the public mind and prejudice the jury. Mr. Skipworth has, in so many words, said that he intended to do so, and that he will do it again. Such a course, we are all of opinion, amounts to a contempt of court. We have then to consider whether it is the less so because it is foolish and ineffectual. It is true that it is utterly ineffectual. Before these meetings had been heard of it came to be a question whether the case should be tried before a single judge or at bar—that is, before the full court, or several judges of it, when each judge takes part in the proceedings, and, possibly, as has actually happened, they may have different opinions and express them. That occurred in the trial of the Seven Bishops, and the judges expressed different opinions and gave conflicting directions to the jury, the result of which was an acquittal. Such is the nature of a trial at bar; and it is within my personal knowledge that before any application was made on the subject, the Lord Chief Justice stated that he thought it right, as it was likely to be a case of much magnitude and importance, that more than one judge should sit to assist him in the trial. Afterwards the Attorney-General, as was his privilege, prayed a trial at bar, and that was at once acceded to. It was, however, the personal desire of the Lord Chief Justice that the case should not be tried by himself alone, but by the several judges at bar. That being so, we find that meetings are held at which the object appears to have been, by means of vituperation, to deter the Lord Chief Justice from sitting at the trial. They will, however, have no such effect. There is not and never has been the slightest doubt in my mind, nor in the mind of any member of the court, that it would be a great dereliction of duty on the part of the Lord Chief Justice, or at least a culpable weakness on his part, if he were to yield to this influence and refrain from sitting on the trial of the case. There is not, however, the slightest idea of doing so. The Lord Chief Justice is of opinion that it is his duty to sit on the trial, and we are all of the same opinion. In the course of these proceedings various observations have been made reflecting upon him, or upon other persons, but principally as to what the Lord Chief Justice is supposed to have said on various occasions on the subject; but it is not right that a judge in the high position of the Lord Chief Justice should be exposed to such attacks and expected to come forward to deny, to explain, or to refute them. A judge in his position cannot be expected to come forward to vindicate himself from such imputations. As I am not to sit upon the trial, I may permit myself to say that I am sure it will be conducted with per-

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fect impartiality. These attacks, then, have failed in their object, but it is not the less incumbent upon us to visit them, for in future cases the influence exerted might be more formidable, and require the strongest measures to repress it. We may imagine the case of a popular person indicted for sedition or treason, and appealing to public sympathy and support. It might require considerable nerve to resist such attempts, and if we were to pass over the present instance, when the more formidable case arose, in which our successors might find themselves obliged to interpose, they might find themselves seriously embarrassed by the precedent we should have set. Besides, it would be a great public scandal if these proceedings were allowed, and it is essential that they should be stopped. That being the view we take of our duty upon this occasion, there can be no doubt that both these persons have attended public meetings with the intention of influencing the ordinary course of justice and prejudicing the trial, and we can come to no other conclusion than that they have been guilty of a contempt of court. The second question that arises is what should be their sentence. Here I would observe that under ordinary circumstances the Lord Chief Justice would preside here, and his absence is not to be supposed as at all inconsistent with anything I have said. But we have to determine the amount of punishment for an offence which has partly consisted of personal attacks upon the Lord Chief Justice; and where that is the case there is the risk that his feelings might be thought vindictive, and the still greater risk that his anxiety to avoid it might lead him to be too lenient, and, therefore, it was desirable that he should avoid this difficulty by being absent on the occasion. In a Court of Equity, where there is only a single judge, it would not be possible to avoid it; but here it is so, and therefore he has not thought fit to take any part in fixing the amount of punishment. But his absence is not to be supposed inconsistent with anything I have already said upon the subject, and his absence has not been caused by anything that has happened. Having said so much, we proceed to consider what should be the sentence in this case. And first, as to Mr. Skipworth, I cannot see anything in his favour. He has deliberately come forward, as he avows, to influence the trial of the case; he declares the claimant to be innocent, and tries to persuade the public that he is so. Up to last Monday week he might have supposed he was doing nothing wrong, but on that day he was present in court and heard Mr. Onslow and Mr. Whalley declared guilty of contempt. Having heard that judgment, he went down to Brighton and held a public meeting, at which he denounced the Lord Chief Justice, and spoke in terms not very complimentary to the rest of the court. For such an aggravated offence we must impose a sentence of fine and also of imprisonment, and the first question is as to the amount of the fine, which must not be excessive, but still must be sufficient to be deterrent, and within those limits the amount is within our discretion. Upon the whole, we think that the

amount ought to be 500*l.* To that we must add a term of imprisonment, and that also must be sufficient to prevent the mischief of interference with the trial which is to be held in April next. We think, therefore, that the term of imprisonment must be three months. Then, as to the other defendant on the indictment: no doubt he has attempted to influence the course of justice, and, therefore, has been guilty of a contempt, but there are differences and mitigating circumstances in his case. One great difference is this, that he is a party in the case, to whom some latitude must be allowed; and, although we think he has gone beyond that limit, still it is a consideration to be borne in mind. Again, it is to be considered that he was assailed by attacks in the press calculated to prejudice his trial, and if he had confined himself to answering those attacks, though he might still have been guilty of a contempt, it would have been one of which this court might have been reluctant to take notice. There is another consideration to which he has very justly adverted, that we must take care in passing sentence upon him not to do anything that might prejudice him in his defence. Still, these proceedings must be stopped, though we do not desire to do anything that might prejudice him in his defence. If we were to impose a fine or inflict imprisonment it might have that effect, but it is necessary that these proceedings should be stopped. Taking these things into consideration, we are of opinion that the proper course would be that he should give security, himself for 500*l.* and another for 500*l.*, that he will be of good behaviour and not be guilty of any contempt of court for the period of three months; otherwise he must be imprisoned until then.

MELLOR, J.—I entirely concur in what my brother Blackburn has expressed upon the matter. I entertain no doubt whatever of the character of the contempt, or that it is one which it is our duty to repress: and I agree with the reasons he has given, and also in the distinction he has drawn between the cases of the two persons now charged before us.

LUSH, J.—I am of the same opinion, and have nothing to add to the observations of my brother Blackburn.

QUAIN, J.—I also entirely agree with my brother Blackburn.

BLACKBURN, J.—Then, that being the judgment of the court, I must proceed to pass sentence accordingly. Mr. Skipworth, the sentence of the court upon you is that for this your contempt you be fined 500*l.*, and be imprisoned in Holloway Gaol for three months, and until the fine be paid; and for you, Tichborne, Castro, Orton, or whatever be your name, the sentence of the court upon you is that you find security and surety for 500*l.* to be of good behaviour for three months, or else that you stand committed for three months.

Hawkins, Q. C. and Bowen, for the prosecution.

The defendants conducted their own cases.

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COURT OF PROBATE.

January 21 and 28, 1873.

(Before Sir J. HANNEN.)

In the Goods of JEMINA STEVENS.(a)

*Administration—Deceased wife a felon convict—Legacy accruing after her death—Notice to Queen's Proctor.**A married woman was convicted of felony and transported to Australia for seven years, where she was lost sight of, and nothing had been heard of her since 1843. In 1860 a legacy to which she was entitled under a will made in 1827 became payable, and the husband now moved for a grant of administration.**Held, that the grant could not be made until a notice had been given to the Queen's Proctor.*

JAMES STRATTON, late of Holme Hall, in the county of Norfolk, a bachelor deceased, died 9th of September, 1827, leaving a will duly executed, which was proved in the court at Norfolk in the same year. By it the testator devised a small copyhold estate at Little Transham, in the county of Norfolk, to his brother John Stratton for life, with remainder to another brother for life, and after his death to Mary Chapman, wife of William Chapman, or her heirs absolutely, subject to the payment of 100*l.* to Jemima Stevens, of Durham Market, in the county of Norfolk. Robert Stratton was the survivor of the three persons named, and died in 1869. Jemima Stevens, whose legacy then became payable, was convicted of felony, and in June, 1833, she was transported to Tasmania for the term of seven years. In 1843, she received a certificate of freedom, and no further intelligence had since been received of her.

O. A. Middleton now moved for a grant of administration to the estate and effects of his wife, save and except any separate property to which she might have become entitled, or which she might have acquired during her sentence. The death of the wife may be presumed, and the legacy being the property of the husband, a *chose in action* though not reduced into possession, the Crown can have no claim to it. The wife had no separate estate, otherwise the Crown would have confiscated it. If the

(a) Reported by W. LEYCESTER, Esq., Barrister-at-law.

husband had been convicted and not the wife, then the Crown would have been entitled. There is no authority precisely in point; but for the converse case of a wife acquiring separate estate during the conviction of her husband, see *Ooombs v. Queen's Proctor* (2 Rob. 547), and *Re Harrington's Trusts* (29 Beav. 24).

Re JEREMIAH STEVENS.

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Property of a Felon.

Our. adv. vult.

Jan. 28.—Sir J. HANNEN.—I have considered the case, and I have come to the conclusion that you must give notice to the Queen's Proctor before any grant can go. If he declines to interfere on behalf of the Crown, then you may take a grant as prayed.

Solicitors, *Whites, Renard, and Co.*

COURT OF QUEEN'S BENCH.

January 22 and 25, 1873.

HEYMANN v. THE QUEEN.

Indictment—Pleading—Defective averment cured by verdict—Conspiracy to remove goods in contemplation of bankruptcy—Error—Debtors' Act 1869 (32 & 33 Vict. c. 62), s. 11.

Sect. 11 of the Debtors Act 1869 (32 & 33 Vict. c. 62) enacts that any person adjudged bankrupt shall be deemed guilty of a misdemeanor if, within four months next before the presentation of a bankruptcy petition against him, he fraudulently removes any part of his property, of the value of 10l. or upwards.

H. was tried on an indictment charging that he and others "unlawfully and wickedly did conspire, combine, confederate and agree together contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against the said H., fraudulently to remove part of the property of the said H. to the value of 10l. and upwards, that is to say, divers, &c., he the said H. then and there being a trader and liable to become bankrupt;" and having pleaded not guilty, was convicted and sentenced.

Error having been brought on the ground that the indictment contained no allegation that H. ever was adjudged bankrupt,

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Held, first, that the offence of conspiracy was complete as soon as an agreement had been entered into to remove the goods in contemplation of an adjudication of bankruptcy, even though no such adjudication ever took place; secondly, that after verdict it must be taken to have been proved that the agreement was entered into in contemplation of an adjudication, though this was not averred in the indictment, such defect being cured by the verdict; thirdly, that as to aider by verdict at common law there is no distinction between criminal and civil pleadings.

ERROR upon a judgment on an indictment, tried at the Central Criminal Court, for conspiracy, containing several counts, of which only the first, second, and fourth are material.

The first count of the indictment charged that Moritz Heymann and others, named in the indictment, on the 2nd of January, 1871, unlawfully and wickedly did conspire, combine, confederate, and agree together, contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against him, the said Moritz Heymann, fraudulently to remove part of the property of him, the said Moritz Heymann, to the value of 10*l.* and upwards, that is to say, divers large quantities of lace and embroidered goods, table cloths, napkins, curtains, petticoats, dresses, handkerchiefs, neckerchiefs, shawls, and shirt fronts, he, the said Moritz Heymann, then and there being a trader and liable to become a bankrupt, against the peace of our Lady the Queen.

The second count of the indictment charged that Moritz Heymann and the said other persons conspired together that the said Moritz Heymann should, within four months next before the presentation of a bankruptcy petition against him, and contrary to the provisions of the Debtors Act, 1869, unlawfully and with intent to defraud, conceal part of his property, to the value of 10*l.* and upwards, that is to say, lace and embroidery, table cloths, napkins, curtains, dresses, petticoats, handkerchiefs, neckerchiefs, shawls, and shirt fronts, to the value of 900*l.*

The fourth count of the indictment charged that Moritz Heymann and the said other persons conspired together that he, the said Moritz Heymann, should, contrary to the provisions of the Debtors Act, 1869, unlawfully and fraudulently dispose of, otherwise than in the ordinary way of his trade, certain of his property, to wit, divers large quantities of curtains and embroidered goods, table cloths, napkins, 400 pieces of embroidery, sixteen dresses, eighty-six handkerchiefs, sixteen dozen neckerchiefs, thirty shawls, large quantities of shirt fronts, and other goods which he, the said Moritz Heymann, had before then obtained on credit, and had not paid for.

Heymann pleaded not guilty. He was convicted on the first, second, and fourth counts of the indictment, and was sentenced on each count to be imprisoned for eighteen calendar months.

The grounds of error assigned were that the indictment was

not sufficient in law ; that the object of the conspiracies charged in the above-mentioned three counts of the indictment was to commit offences under sect. 11 of 32 & 33 Vict. c. 62, sub-sects. 4, 5, and 15, which section is limited to persons who have been adjudged bankrupt, whereas in none of these counts was it alleged that the defendant had been adjudged bankrupt ; that there was no allegation that any creditor of the defendant entitled to petition had presented a petition against him to the Court of Bankruptcy ; that there was no allegation that defendant and the other persons knew at the dates of the alleged conspiracies that the defendant was a person to whom sect. 11 of the Debtors' Act applied.

Sect. 11 of 32 & 33 Vict. c. 62, enacts that : " Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour ; that is to say if after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, unless the jury is satisfied that he had no intent to defraud : if after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of ten pounds or upwards : if within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit, and has not paid for, unless the jury is satisfied that he had no intent to defraud." Sect. 19 of the same Act provides that : " In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading adjudication, or any proceedings or in order, warrant, or document of any court acting under the Bankruptcy Act 1869."

Besley, for the plaintiff in error.—The counts upon which the defendant was convicted do not disclose an indictable offence. Sect. 19 of the Debtors Act 1869 does not apply to this case, as the indictment here is an indictment at common law for a conspiracy to commit offences under that Act, not an indictment for any offence under that Act. The facts, therefore, must be alleged with all the particularity required to constitute the offence charged in the indictment. Now there is no allegation that any bankruptcy petition was ever presented against the defendant, or

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that any adjudication ever took place. In *Rex. v. Jones* (4 B. & Ad. 345) the indictment, after stating that a commission of bankruptcy had issued against the defendant by virtue of which the commissioners adjudged him to be a bankrupt, charged that he and other defendants conspired to conceal a part of his personal estate. After verdict this indictment was held defective for not showing that the defendant had actually become a bankrupt. "It does not state enough," said Parke, B., "to show that the defendant conspired to do any unlawful act: it ought to have alleged not merely the issuing of a commission of bankruptcy, but that there had been a trading by Jones, and a petitioning creditor's debt, and that he became bankrupt." "The indictment," said Taunton, J., "ought to contain averments of all matters necessary to constitute the offence; it is not sufficient merely to allege matter which makes it probable that an offence has been committed. It was not enough to show in this case that a commission issued, or that the commissioners adjudged the party to be a bankrupt. He must actually have become bankrupt." In *Rex. v. Mason* (2 T. R. 581) it was held that an indictment charging the defendant with obtaining money by false pretences was insufficient, if it did not show what the false pretences were; and that if the defendant were convicted on it the court would reverse the judgment upon a writ of error. In *Reg. v. Peck* (9 A. & El. 686) it was held that a count for conspiring to deceive and defraud divers of Her Majesty's subjects who should bargain with defendants for the sale of goods, of great quantities of such goods without making payment, remuneration or satisfaction for the same, with intent to obtain profit and emolument to defendants, was bad, as not showing that the conspiracy was for a purpose necessarily criminal; also that a count charging that defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale, and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emolument to themselves, was bad for omitting to show in what respect the deed was false and fraudulent. [MELLOR, J.—These cases have been virtually overruled by later ones.] The case of *Sysderff v. The Queen* (11 Q. B. 245), in which the court held good, on writ of error, an indictment charging that the defendants "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud" the prosecutor "of his goods and chattels," certainly seems inconsistent with *Reg. v. Peck* (*ubi sup.*). [BLACKBURN, J., referred to *Nash v. The Queen* (4 B. & S. 935), where an indictment under the Bankruptcy Act, 1861, s. 221, alleged that the defendant, having been adjudged bankrupt by the Court of Bankruptcy for the London district, being then the court duly authorised and competent to adjudicate as aforesaid upon his examination in the said court, with intent to defraud and defeat the rights of his creditors, did not fully and

truly discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and in goods, and did not, as to part of his property (not being part fully and *bonâ fide* before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expense of his family), fully and truly discover to the best of his knowledge and belief as aforesaid, how, and to whom, and for what consideration, and when he had disposed of, assigned, or transferred such part thereof, to wit, &c. ; and it was held on error that, supposing the indictment bad for want of certainty, the objection was cured by 7 Geo. 4, c. 64, s. 21, as the offence was sufficiently described in the words of the statute.] Sect. 21 of 7 Geo. 4, c. 64, applies only to offences created by statute, not to such an offence as the plaintiff has been found guilty of. It enacts that "where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute if it describe the offence in the words of the statute." The indictment in the present case, being at common law, is bad for not stating all the ingredients of the offence, and, amongst others, that a petition had been presented against the plaintiff in error, and that he had been adjudged a bankrupt. [BLACKBURN, J.—To complete the offence that would be necessary ; but the offence of conspiracy may be complete, though the crime contemplated is never committed. Why should it not be a conspiracy to conspire to remove goods within four months of a contemplated bankruptcy by the owner ?] That may be so ; but in the present case the indictment contains no allegation that the parties conspired in contemplation of bankruptcy. [BLACKBURN, J.—In Com. Dig. Pleader, C. 87, we find that "if a declaration omits that which was necessary to be proved, otherwise the plaintiff could not recover, this shall be aided by a verdict for the plaintiff." So 1 Wms. Saund. 260 n. 1 : "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." All this is said only of the pleadings in civil actions. [BLACKBURN, J.—I know of no distinction in this respect between civil and criminal pleadings. Is there any authority for making a distinction ?] In 1 Chitty's Crim. Law, p. 172, we read : "It is further laid down that an indictment ought to be certain to every intent, and without any intendment to the contrary ; and that it ought to have the same certainty as a declaration : for all the rules that apply to civil pleadings are applicable to criminal accusations. The last observa-

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tion, indeed, does not sufficiently express the degree of precision required; for technical objections have been more frequently admitted to prevail in criminal than in civil proceedings, and it was expressly laid down by Lord Mansfield (1 Leach 134) that a greater strictness is required in the former than is necessary in the latter; and in the first a defendant is allowed to take advantage of mere formal exceptions." Archbold's Pleading and Evidence in Criminal Cases, p. 53 (17th edit.), was also referred to.

Bromby, in support of the conviction, was told that the court would consider before the 25th instant whether it would be necessary to hear him.

January 25.—BLACKBURN, J.—This was a writ of error argued before the Lord Chief Justice, my brothers Mellor, Quain, and myself on the last Crown paper day. We intimated at the conclusion of the argument for the plaintiff in error that we should say to-day whether we thought it necessary to hear any arguments in support of the conviction; and we have come to the conclusion that it is not necessary to do so. The indictment was for conspiracy, and it is not necessary to cite any authority to show that the offence of conspiracy is complete as soon as there is an agreement to do a thing which would be, if done, though not a crime, such a matter as would bring the agreement to do it within the definition of conspiracy. Here the prisoner has been convicted upon an indictment on several counts, but all the objections raised apply to the first count, and the reason for our decision as to that count will apply to our judgment upon the other two. The first count charges that Moritz Heymann and the other persons mentioned in it, on the 2nd of January, 1872, "unlawfully and wickedly did conspire, combine, confederate, and agree together, contrary to the provisions of the Debtors' Act, 1869, and within four months next before the presentation of a bankruptcy petition against the said Moritz Heymann, fraudulently to remove part of the property of the said Moritz Heymann to the value of 10*l.* and upwards, that is to say, divers large quantities of lace and embroidered goods, &c., he the said Moritz Heymann then and there being a trader, and liable to become bankrupt, against the peace of our Lady the Queen." On this there is a plea of not guilty and a verdict of guilty. Sect. 11 of the Debtors' Act, 1869 (32 & 33 Vict. c. 62), enacts that "any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act, 1869, shall in each of the cases following be deemed guilty of a misdemeanor. . . . If after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of 10*l.* or upwards, unless the jury is satisfied that he had no intent to defraud; if after the presentation of a bankruptcy petition against him, or the commencement

of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of 10*l.* or upwards, &c." It is quite clear that if an agreement were come to, or a conspiracy entered into such as alleged in the first count of the indictment, with a view to a prospective and contemplated bankruptcy, the offence of conspiracy would be at once complete, whether an adjudication of bankruptcy did or did not follow. The objection here taken on behalf of the plaintiff in error is, that the count does not say that the agreement or conspiracy was in contemplation of, or with a view to, an adjudication; and if we were determining such a question on demurrer, I am not prepared to say that that might not be a good objection. But there is a general rule as to pleading at common law—and I think it right to say that there is no distinction, where questions of this sort arise, between the pleadings in civil and criminal proceedings—that where an averment which is necessary to support a particular part of the pleading has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court after verdict that unless this averment were true the verdict could not be sustained, in such a case the verdict cures the defective averment, which might have been bad on demurrer. The authorities upon this subject are all stated in 1 Wms. Saund. 260, n. 1 (last edit.). If the confederacy in the present case were entered into in contemplation or expectation of a future bankruptcy, there is no doubt that the offence of conspiracy was committed. The count avers that the plaintiff in error and the others mentioned in it unlawfully and wickedly conspired, combined, &c., contrary to the provisions of the Debtors' Act, 1869, and within four months next before the presentation of a bankruptcy petition against him, fraudulently to remove part of his property; but it does not state expressly that this was done in contemplation of a bankruptcy petition, but only that it was done within four months next before the presentation of such a petition. We think that the verdict of the jury upon the issue of not guilty could not have been arrived at unless it were proved that the fraudulent removal of the goods was in contemplation or expectation of an adjudication in bankruptcy; and if the confederacy was entered into in contemplation of an adjudication, the offence of conspiracy was at once complete as soon as the parties had agreed, whether, in fact, any adjudication followed or not. The objections, therefore, taken on behalf of the plaintiff in error, fail, and our judgment will, therefore, be for the Crown.

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Judgment affirmed.

Attorney for prosecution, *A. G. Ditton.*

Attorney for plaintiff in error, *H. Sydney.*

NORFOLK CIRCUIT.

NORTHAMPTON SPRING ASSIZES, 1873.

(Before MARTIN, B.)

REG. v. WATERS. (a)

Breaking prison—Arrest without warrant—Remand dismissal.

W. was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. W. was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates.

Held (per Martin, B.), that the dismissal by the magistrates was not equivalent to an acquittal by a jury, that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand, and that these facts were no defence to the indictment for breaking prison.

THE prisoner was indicted for breaking out from the lock-up at Wellingborough, being then in lawful custody for felony. *Monckton* for the prosecution.

Graham for the prisoner.

It appeared that the prisoner and another man had been given into the custody of a police officer, without warrant, on a charge of stealing a watch from the person. They were taken before a magistrate. No evidence was taken upon oath, but the prisoner was remanded for three days. The prisoner broke out of the lock-up and returned to his home. He appeared before the justices on the day to which the hearing of the charge had been adjourned, and on the investigation of the case it was dismissed by the justices, who stated that in their opinion it was a lark, and no jury would convict. The above facts having been proved,

Graham, for the prisoner, submitted there was no case, as the prisoner was not lawfully in custody, since the magistrate had no power to remand him and detain him in custody without evidence on oath.

MARTIN, B.—On referring to *Jervis's Act* (11 & 12 Vict. c. 42, s. 21), held that the justices had such power.

Graham contended, secondly, that the charge having been dismissed by the justices, the prisoner could not be convicted of

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

breach of prison, citing Lord Hale, i. 610, 611, that if a man be subsequently indicted for the original offence and acquitted such acquittal would be a sufficient defence to an indictment for breach of prison.

MARTIN, B., held that a dismissal by magistrates was not tantamount to an acquittal upon an indictment. It simply amounted to this, that the justices did not think it advisable to proceed with the charge, but it was still open to them to hear a fresh charge against him.

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Verdict—Guilty. Sentence—Six weeks' imprisonment.

NORFOLK CIRCUIT.

BEDFORD SPRING ASSIZES, 1873.

(Before MARTIN, B.)

REG. v. ASPLIN.(a)

False entry in a marriage register.

Upon an indictment under 24 & 25 Vict. c. 98, s. 37, for making a false entry in a marriage register, it is not necessary that the entry should be made with intent to defraud, and it is no defence that the marriage solemnised was null and void, being bigamous. If a person knowing his name to be A. signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two.

WILLIAM JOHN WARD ASPLIN was indicted under 24 & 25 Vict. c. 98, s. 37, for feloniously inserting in the register of marriages authorised and required to be kept for the parish of Stondon a certain false entry relating to the marriage of a man representing himself to be James Richardson to Sarah Ann Kinlock on the 3rd of June, 1872.

Graham for the prosecution.

O'Malley, Q.C., and *Naylor* for the prisoner.

The facts of the case were shortly as follows. A person by the name of Wilcocks was engaged to be married to Sarah Ann Kinlock, but he being a married man had assumed the name of

(a) Reported by J. W. COOPER, Esq., Barrister-at-Law.

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Richardson. The friends of Miss Kinlock, knowing little or nothing of Richardson, had insisted that some member of Richardson's family should be present at the marriage. Richardson made the acquaintance of the prisoner in a casual manner in a train on the Great Northern Railway, and invited him as a guest to the wedding. On the prisoner's arrival on the morning the marriage was to be solemnised Richardson told the prisoner that his brother had failed to be present, and asked him to personate him. This the prisoner, after some reluctance, agreed to, and after the ceremony was concluded signed his name in the parish register of marriages as "Geo. Richardson," there being also two other witnesses. Before the bride and bridegroom left the prisoner admitted the deception he had practised, and the marriage was never consummated. Richardson *alias* Wilcocks was indicted for bigamy and convicted at the Old Bailey.

O'Malley, Q.C., on these facts being proved, submitted that there was no case, as it had not been proved that the entry was fraudulent, and that there was no entry of a legal marriage, it being bigamous; therefore, it was not a false entry relating to a marriage within the meaning of the Act; further, that only two witnesses being necessary the entry by the prisoner was mere surplusage and not material.

MARTIN, B., overruled all these objections, and told the jury that the sole question was whether the prisoner, well knowing his name was Asplin, had signed his name George Richardson; if so, he was guilty. He refused to reserve any of the points for the Court of Criminal Appeal.

The jury convicted the prisoner, and he was sentenced to a month's imprisonment.

MIDLAND CIRCUIT.

WORCESTER SPRING ASSIZES.

March 3rd, 1873.

(Before QUAIN, J.)

REG. v. ELIZABETH BANKS AND LEAH BANKS. (a)

Conspiracy to murder unborn infant—Evidence of conspiracy continuing after birth of infant—Proposing to murder infant expected to be born—24 & 25 Vict. c. 100, s. 4—Effect of letter proposing to murder written before birth of infant, but posted so as to arrive at destination subsequent to birth—Effect of intercepted letters.

An indictment alleging a conspiracy to murder a living infant will not be supported by evidence of a conspiracy existing previous to the birth of such infant unless the agreement and intention continue subsequently to the birth.

A design by two persons, by different means, to murder a child of which a woman is pregnant, and expects soon to be delivered, is sufficiently proximate to be the subject of a conspiracy.

A. wrote and put in the post-office at H., at four o'clock one afternoon, a letter addressed to B., at W., containing a suggestion for the murder of a child to which B. was expecting to give birth. The child was born at one a.m. on the following morning. The letter posted at H. would have been in the ordinary course, and was in fact delivered at the house where B. lodged at eight o'clock on the morning of the day after it was posted at H. The letter never came to B.'s hands, being intercepted by the landlady of the house :

Held, on these facts, that the jury might find that the act of A. continued until the letter was delivered at the house of B., and if the letter had reached B., that A. might properly have been convicted of soliciting and inciting B. to murder her child, and, the letter having been intercepted, that A. could be convicted of an attempt to solicit and incite B. to murder her child.

INDICTMENT.

City of Worcester, and county } The jurors for our lady the
 of the same city, to wit } Queen, upon their oath, present
 that Elizabeth Banks and Leah Banks, on the 15th day of
 October, in the year of our Lord one thousand eight hundred and

(a) Reported by W. H. CLAY, Esq., Barrister-at-Law.

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seventy-two, unlawfully and wickedly did conspire, confederate, and agree together a certain infant female child of tender age, to wit, of the age of two days, the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of their malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Second Count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that on the 11th day of October, in the year of our Lord 1872, the said Elizabeth Banks was delivered of a female child, the name whereof is to the jurors aforesaid unknown, which said child was then and still is living, and that the said Elizabeth Banks, and the said Leah Banks, did unlawfully and wickedly conspire, confederate, and agree together the said child feloniously, wilfully, and of their malice aforethought to kill and murder against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Third Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid the said Elizabeth Banks was delivered of a female child, which said child then was and still is alive, and the name whereof is to the jurors aforesaid unknown, and that before the said child was born, and whilst the said Elizabeth Banks carried and was quick with the said child of which she was so delivered as aforesaid, to wit, on the 9th day of October, in the year aforesaid, the said Elizabeth Banks, and the said Leah Banks, being evil disposed persons, and wickedly devising and intending, if and in case the said child was born alive, the life of the said child to take and destroy, unlawfully and wickedly did conspire, confederate, and agree together the said child if born alive, feloniously, wilfully, and of their malice aforethought, to kill and murder. And the jurors aforesaid, upon their oath aforesaid, do further present that afterwards, to wit, on the 10th day of October, in the year aforesaid, and in pursuance of and according to the same conspiracy, confederation, and agreement, the said Leah Banks did write and post at a certain post office a letter to the said Elizabeth Banks, with intent the same should be delivered to and read by the said Elizabeth Banks, and in and by the said letter did incite, encourage, and propose to the said Elizabeth Banks the life of the said child to take and destroy. And the jurors aforesaid, upon their oath aforesaid, do further present that after and in pursuance of and according to the said conspiracy, confederacy, and agreement, to wit, on the 13th day of October, in the year aforesaid, the said Elizabeth Banks did write a letter to the said Leah Banks, and did deliver the said letter to one Jane Mables, with intent the said Jane Mables should post the same, and that the same should be delivered to and read by the said Leah Banks, and in and by the said letter did solicit and propose to the said Leah Banks to aid and assist her, the said Elizabeth

Banks the life of the said child to take and destroy, against the peace of our lady the Queen, her crown and dignity.

Fourth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the 11th day of October in the year of our Lord 1872 the said Leah Banks unlawfully and wickedly did solicit, encourage, persuade, and endeavour to persuade the said Elizabeth Banks a certain female child then lately before born of the body of the said Elizabeth Banks, the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Fifth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid the said Leah Banks unlawfully and wickedly did propose to the said Elizabeth Banks a certain female child then lately before born of the body of the said Elizabeth Banks, and the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Sixth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid, the said Elizabeth Banks was delivered of a certain female child, which said child was then and still is living, the name whereof is to the jurors aforesaid unknown, and that before the birth of the said child, and whilst the said Elizabeth Banks carried and was quick with the said child, to wit on the 10th day of October in the year aforesaid the said Leah Banks falsely, wickedly and unlawfully did solicit and incite the said Elizabeth Banks, the said child when born by means of a certain poison, to wit, salts of lemon, feloniously, wilfully, and of her malice aforethought to kill and murder, to the evil example of all others in like case offending, and against the peace of our lady the Queen, her crown and dignity.

Seventh Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the 11th day of October in the year of our Lord 1872, the said Elizabeth Banks was delivered of a female child, then and still alive, the name whereof is to the jurors aforesaid unknown, and being so delivered of the said child as aforesaid afterwards, to wit, on the 15th day of October in the year aforesaid, unlawfully and wickedly did solicit, encourage, persuade, and endeavour to persuade the said Leah Banks the said child feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Eighth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the day and year last aforesaid the said Elizabeth Banks unlawfully and wickedly did propose

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to the said Leah Banks a certain female child then recently born of the body of the said Elizabeth Banks, the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Ninth Count.—And the jurors aforesaid, upon their oath aforesaid, do further present that on the said 11th day of October, in the year aforesaid, the said Elizabeth Banks was delivered of a female child, then and now living, the name whereof is to the jurors aforesaid unknown, and afterwards, to wit, on the fifteenth day of October in the year aforesaid, falsely, wickedly, and unlawfully did solicit and incite the said Leah Banks her the said Elizabeth Banks to aid and abet in taking and destroying the life of the said child by drowning, and so the said child feloniously, wickedly, and of her malice aforethought to kill and murder, to the evil example of all others in the like case offending, and against the peace of our lady the Queen, her crown and dignity.

T. F. Streeten for prosecution.

Jelf for prisoners.

The prisoner Elizabeth Banks, aged eighteen, having been seduced, and being pregnant with an illegitimate child, came to Worcester in August, 1872, and took a lodging at the house of one Martha Mables. About one a.m. on the morning of Thursday, the 11th of October, she was confined, and a child was born alive, and was living up to the time of the trial. The prisoner Leah Banks, although really the aunt of Elizabeth, was only a few months older than her niece, and Leah and Elizabeth had lived together from childhood in the house of Leah's mother, at Hartpury, near Gloucester. About half-past three on the afternoon of Wednesday, the 10th of October, the prisoner Leah came to the post-office at Hartpury, and gave to the postmistress a letter addressed to the prisoner Elizabeth. The letter was in due course forwarded to Worcester by the mail, leaving Hartpury soon after four o'clock, and was delivered at the house of Mrs. Mables, in Worcester, on the following morning, a few hours after the birth of the child. Mrs. Mables, into whose hands the letter came, did not deliver it to the prisoner Elizabeth, and in fact it never reached her hands, nor was communicated to her. The letter contained the following passage:—"I think the best thing for you to do is to get about two or three pennyworth of salts of lemon, as that will be easier got than anything else, and as soon as you can get to feed your baby yourself, put a very little in its food at a time; mind no one else do not have any of it, but give it very little at a time, as it is a strong poison, and the child will gradually waste, and in a few days it will be dead; and, of course, no doctor nor anything of the kind will be wanted, but it will be took in the night and put in the cemetery, and no one will have no suspicion. Burn the paper you buy it in as soon as

you get it home, and put it in some plain white, as there will be a lable upon it. Tell them at the druggists you want it to take stains out of clothes." On Sunday, the 14th of October, the prisoner Elizabeth wrote, and gave to a girl in the house, a letter, which she requested might be posted. The letter was handed to Mrs. Mables, who did not post it, but delivered it with the letter mentioned above to the chief constable at Worcester. The letter written by Elizabeth was addressed to the prisoner Leah, and contained the following passage:—"Tell me if I cannot come home on Saturday I have been thinking I will not come until Saturday night, then, if I am obliged to bring it" (*i.e.*, the baby) to "Gloucester alive, you and I can easily destroy it coming along the causeway. When you are coming in, look and see if we can manage to drown it anyhow. Be sure you come, not let grandmother, that would do us altogether." After receiving this letter, the chief constable took Leah Banks into custody at Hartpury, and in her possession found parts of three letters in prisoner Elizabeth's handwriting. The letters bore no dates, but were apparently written after the prisoner Elizabeth's arrival in Worcester. In that which was apparently the earliest, was the following passage:—"And, my dear girl, between Worcester and Hartpury between us we can easily manage to destroy the child." The second letter contained the following passage:—"I am going to bespeak the woman next week, but it is possible I shall not have her none the more for that. I have me a box; I gave 2s. 6d. for it, and if I cannot carry my scheme into effect, I told them I was going to my aunt in Staffordshire, and she was going to bring the child up, and I should have to get my living, so I should not suckle it then. I will the morning as I start home give it a drop of lodnam, and slip it inside my box when going to the station. No one will have suspicion such a young thing as me having a child; and you and me can easily burry it; and amid your kindness and Ted's attention I shall soon forget the child. I shall have saved a sovereign by the time it comes off. You see to blind them I have had to buy calico." The following passage was in the third letter:—"And besides this is the best place I could get, because as soon as my light is out they never interfere with my room; that is the only and best way I shall get out of it. Now don't you be foolish and think I shall be cast away, because if I get that it will keep life in me till the child is dead, which of course that will soon be if not attended to. Tell me, won't that be the best, my dear. What can I do with a young baby; I must and will destroy it somehow."

All the letters, which were of considerable length, expressed great anxiety and distress of mind on the part of both prisoners.

When taken into custody the prisoner Leah, admitting that she had written the letter received at Worcester on the 11th, said that she was afterwards sorry that she had done so, and that she had written to her niece immediately afterwards not to do anything in the matter.

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At the police cells in Worcester, on the following morning, she said—"I thought she had another fortnight to go, and wrote that letter thinking that would make her more easy in her mind; and then that somebody might be present when the child was born. I wrote her before, and if she has my letter she ought to give it up, telling her not to mind, for that we would work both day and night, and pay for the child, which we would put out. . . . What I did was to keep it from grandmother, as I was afeared it would break her heart."

No letter from Leah to Elizabeth, other than the one intercepted on 11th October, was produced at the trial, nor was any evidence given of any other letter.

Jelf, for the prisoners, contended that there was no evidence of conspiracy to murder a living child, as alleged in the first and second counts; that the conspiracy, if it existed, referred to a child not yet born, and that the first and second counts of the indictment must, therefore, fail. As to the third count, he objected that the object of the conspiracy was too indefinite and remote; that a conspiracy must have an existing object to act upon at the time of its inception; and, also, that the acts charged were at most acts tending to the formation of a conspiracy, and were not done in pursuance of, nor to carry into effect a conspiracy already formed. As to all the first three counts, he contended that the letters proved no actual design existing between the parties; that the method suggested for destroying the child varied in each letter of Elizabeth, and that Leah's suggestion as to salts of lemon was entirely different. That each letter was a separate proposal, not accepted or assented to by the other party, and that, by analogy to a contract, no conspiracy could exist if parties were not *ad idem* in regard to object and means.

QUAIN, J., ruled that the first and second counts could not be supported by proof of a conspiracy only existing previous to the birth of the child, but that if the conspiracy previously formed was continuing at the time of the birth, the counts would be proved. That it was a question for the jury whether the conspiracy, if it previously existed, had or had not been abandoned when the child was born. And with reference to the third count, that it showed an object in the mind of each prisoner sufficiently proximate to be the subject of a conspiracy; and that the overt acts charged not being a material part of the count, it was unnecessary to consider their effect. With reference to the first three counts, it was unnecessary that parties should be agreed as to the exact means for accomplishing an end on which they were agreed.

Streeten abandoned the fourth and fifth counts, being content, as regarded Leah Banks, to rest this part of the case on the sixth count, charging that she "incited Elizabeth to murder the child when it should be born," and pointing out that on that count she could be convicted of *attempting* to solicit and incite.

Jelf then contended that the sixth count must fail. (1.) The

child was not born at the time of the alleged solicitation by Leah contained in the intercepted letter posted at Hartpury on the 10th of October. (2.) As the letter, being intercepted, never reached the hands of Elizabeth, the offence was never committed. (3.) (In reply to *Streeten's* suggestions.) That there could be no conviction for an attempt to commit an offence which was itself an attempt (*e.g.*, an attempt to solicit or incite)

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With reference to the seventh, eighth, and ninth counts, *Jelf* raised the objection that the letter from Elizabeth of the 14th of October never came to the hands of Leah, and that there could be no conviction for the attempt on the ground above stated with reference to the sixth count. -

QUAIN, J., ruled (1) that the act of Leah in sending the letter of the 10th of October continued up to the time when the letter in the ordinary course would be received, unless some act were in the meantime done to counteract the effect of the letter, and that the jury must say upon the evidence whether the act did so continue or not. (2.) That as the letters had been intercepted, the offence contemplated by the statute had not been committed. (3.) That either or both of the prisoners might be convicted of the attempt. He offered, if necessary, to reserve all the points raised.

Jelf then addressed the jury on behalf of the prisoners.

QUAIN, J., in summing up, told the jury that before convicting the prisoners of a conspiracy, they must be satisfied that an agreement actually existed between Leah and Elizabeth to destroy the child when born. The jury must say whether the letter from Leah to Elizabeth, and the three previous letters from Elizabeth to Leah indicated any such agreement. A mere suggestion from one to the other would not be sufficient; but if the jury found that an agreement actually existed either before or at the time of the birth to destroy the child "somehow," it was not necessary that the means of destruction should have been agreed upon. If the jury found that a conspiracy existed previous to the birth, they would say on the evidence if it continued until the child was born. The statement of Leah to the chief constable had a most important bearing on this subject. With reference to the remainder of the indictment, the jury must say, with regard to Leah, whether or not she did any act to retract her letter written on the 10th before the time when it would, in the ordinary course, have been received by Elizabeth; and, as to both the prisoners, whether the passages contained in the intercepted letters were serious and deliberate solicitations or propositions for the murder of the child, or whether they were only the expression of wicked thoughts passing through the minds of the writers not intended to be acted on. They might in their discretion on the evidence find either or both of the prisoners guilty of attempting to propose to the other to murder the infant of Elizabeth.

The jury having found the prisoners guilty of the attempt to propose, a verdict was entered against Leah for the attempt

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under the sixth count, and against Elizabeth for the attempt under the *eighth* count.

QUAIN, J., sentenced Elizabeth to four months', and Leah to three months' imprisonment; offering to reserve the question whether on the indictment the prisoners could be properly convicted of the attempt, but on behalf of the prisoners the point was not pressed.

Attorney for prosecution, *Pitt*, Worcester.

Attorney for prisoners, *Clutterbuck*, Worcester.

NORTHERN CIRCUIT.

Durham, March 6, 1873.

R. v. COTTON.(a)

(Before Mr. Justice ARCHIBALD.)

Murder—Poison—Intent—Evidence.

Where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible.

R. v. Geering, 18 L. J., M. C. 211, followed.

MARY ANN COTTON was charged with the wilful murder of her son, Charles Edward Cotton, at West Auckland, on the 12th of July last.

C. Russell. Q.C., Greenhow, Bruce, and Trotter were for the prosecution.

Campbell, Foster, and Part were for the defence.

The deceased child was the son of the prisoner's late husband, and she had to support it. Evidence was given of her having repeatedly complained that she had to support it. She had, it appeared, an interest in its death, as its life was insured by her in the Prudential Insurance Office, and, at its death, she would be entitled to 4l. 10s. On the 6th of July, 1872, the child was well, and, although delicate looking, was active on that day; and at other times evidence was given of her having ill-treated it. On the

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.

8th of July the deceased was taken ill, and the prisoner sent for the doctor, and it was visited by him till the 12th of July, on which day it died. The deceased was buried after a somewhat hasty *post mortem* examination; but certain suspicious circumstances occurred which led to the body being exhumed, by an order of the Secretary of State; the viscera were examined, and were found to contain arsenic. Mr. Kilburn, the parish doctor, a surgeon, who attended deceased, was called, and in his cross-examination, he said that he had prescribed morphia, prussic acid, and bismuth to the child. The child had had fits and convulsions before it died, and morphia had been known to produce convulsions, but not, it was said, when it was administered in the doses which he prescribed. Prussic acid was a dangerous poison, but not taken in the doses he prescribed; and bismuth was an irritant poison, which, taken in large doses, might inflame the stomach and bowels, but he had only prescribed it in small quantities. He had sent twelve doses to the child; one preparation of bismuth. The subcarbonate, was frequently impure, and adulterated with arsenic, but only in minute quantities. He kept his poisons on a nest of five or six shelves. Arsenic was on the second shelf in a bottle, about No. 5. Prussic acid was in a bottle next or next but one to it, about No. 6; and the subcarbonate of bismuth was in a bottle at the other side, about No. 2 or 3.

Mr. Kilburn also stated he was aware that chronic poisoning by arsenic had been caused by the use of arsenical or green papers to walls. He did not think that the fumes of arsenic could arise from the arsenic used in the room, as fumes were only thrown off at a high temperature, about 280 degrees.

It was proved by a charwoman named Dodds that about six weeks before the death of the child she was sent by the prisoner to a chemist's for twopennyworth of soft soap and arsenic, which were supplied to her mixed together. The chemist proved that he put in the soft soap from four to six drachms of arsenic, and mixed them. This mixture the charwoman rubbed into the joints and crevices of an iron bedstead to kill bugs, and also twice rubbed it over and between the iron cross-belts under the bed. A four-inch mattress was placed on this, and was sometimes turned, to prevent its wearing all on one side against the iron crossbars. Some of the soap was also used for the skirting-boards and near the fireplace on the floor. Nearly all was used, and the remainder was placed in a small jar in a lumber room. On a search being made at the house this jar was not found, and nothing containing arsenic. The paper of the room had a bright green fluffy flower on a stone-coloured ground.

Mr. Scattergood, an analytical doctor of Leeds, was called, and proved having received the jars containing the viscera of the deceased, and the contents of the stomach, and also some articles found in the house of the prisoner. None of these latter contained poison of any kind. He found traces of arsenic in the

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contents of the stomach, in the substance of the stomach, in the contents of the bowels, and in the substance of the bowels, in the liver, and in the kidneys; none in the spleen. He estimated the total quantity at 2·60 grains. In his judgment, on these facts, he thought that repeated doses of arsenic had been administered, and that arsenic had been given shortly before death, because it was found in the stomach. Two to three grains was sufficient to cause death, and half that quantity for a child. In his judgment the deceased had died from poisoning by arsenic.

It was then proposed by the counsel for the prosecution to ask him if he had subsequently received several other jars containing the viscera of other persons, and had examined them. This question was objected to. The question was pressed, and *Reg. v. Geering* (18 L. J., M. C. 215), and *Reg. v. Garner* (3 F. & F. 681), were relied upon as authorities for the proposition.

O. Foster objected that, on principle, the evidence was not admissible, as collateral to the issue, as *res inter alios actæ*, and as prejudicing the fair trial of the prisoner on the issue joined by interposing other issues, or prejudicing facts, which the prisoner would not be entitled to explain by evidence or cross-examination in the course of the case on which she was being tried. This might be extended to several collateral facts, each raising a different issue to be tried in the course of her trial. In support of this view, Taylor on Evidence, vol. 1, paragraphs 239, 298, 298a, and 306, were relied upon, and *Reg. v. Holt* (8 Cox C. C. 411), was cited, as in principle overruling *Reg. v. Geering*, a ruling at the Old Bailey by Chief Baron Pollock, Baron Alderson, and Justice Talfourd, twelve years before; and *Reg. v. Gardiner*, a decision of Justice Willis, at assizes, in accordance with *Reg. v. Geering* and *Reg. v. Fridge*, reported in 33 L. J. 74, in which *Reg. v. Holt* was cited and affirmed by the Court of Criminal Appeal, of which Chief Baron Pollock and Justice Willes were two of the judges constituting the court.

The learned Judge said he would consult Baron Pollock, which he did; and on his return he said he had considered the point very carefully with his learned brother Pollock, and, on the authority of *Reg. v. Geering* and *Reg. v. Gardner*, he thought he ought to receive the evidence.

Foster asked his Lordship to reserve a case for the consideration of the Court of Criminal Appeal as there were conflicting authorities.

His LORDSHIP said he must decline to do so, having made up his mind on the point.

The evidence of Mr. Scattergood was then resumed. He said soft soap might be washed from the mixture of arsenic, so as to leave the arsenic pure.

Evidence was then given of the death of a child named Frederick Cotton, a boy aged ten years, son of the prisoner, on the 10th of November last; of the death of Robert Robson Cotton, the prisoner's infant, aged fourteen months, on the 28th of March;

and of a man named Mattrass, on the 1st of April, who then lodged with the prisoner. They were all attacked with vomiting and purging, pains in the bowels, and convulsions, and were all attended by the prisoner, and had their food cooked for them. She was kind and attentive to them all. Mattrass paid her eleven shillings a week for lodging and board, and was engaged to be married to her. A Dr. Richardson attended Mattrass, and visited him seven days. He thought he had disease of the kidneys—Bright's disease—and believed he died of disease of the kidneys, but gave his certificate that he died from gastric fever. Dr. Kilburn attended the two children, and certified that the elder one died from typhoid or gastric fever, and that the infant died from convulsions in teething. Each of the three had been treated for the disease it was believed he had. Under an order of the Home Secretary, their bodies were exhumed in September and October last, and portions of the viscera of each were sent to Mr. Scattergood, and in each he found traces of inflammation from irritant poison, and the presence of arsenic. In Mattrass he found seventeen and a half grains in the stomach. His opinion on these facts was, that each had died from the administration of arsenic. In the course of his cross-examination in the case, Mr. Scattergood admitted that soft soap and arsenic would dry from exposure to air; that a heated room would assist to dry it, and that a mattress, or any portion of it, would absorb moisture from the soap. If dry, the attrition of the crossbars of the bed over one another, from getting in and out of bed, would be likely to cast dry particles on the floor. If nearly all the soft soap and arsenic had been used by Mrs. Dodds on the bedstead, about 300 grains of arsenic must be there; this, by trampling on the floor and on the carpet, might be raised as dust floating in the air, and, like Scheeles' green wall papers, might cause irritation and dryness in the throat and eyes, and, by means of the lungs, become absorbed into the system, but could not get into the contents of the stomach. No doubt the quantity of arsenic was much greater than could be rubbed off any wall paper.

This was the case for the prosecution.

HIS LORDSHIP said there was no evidence of the possession of any arsenic by the prisoner before the death of the three persons, evidence of which had been interposed.

Mr. *Russell* said the witness who could prove this had just been confined, and he proposed to put in her deposition. This had been given in Mattrass's case.

Mr. *Foster* objected.

POLLOCK, B., said he was of opinion that the depositions could not be put in.

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Guilty.

NORTHERN CIRCUIT.

Manchester, March 21, 1873.

(Before Mr. Baron POLLOCK.)

R. v. HASELTINE.

Arson—24 & 25 Vict. c. 97, s. 7—Indictment—Want of certainty—Averment of intent—Evidence.

It is not necessary in a count in an indictment laid under sect. 7 of 24 & 25 Vict. c. 97, to allege an intent to defraud, and it is sufficient to follow the words of the section without substantively setting out the particular "circumstances" relied on as constituting the offence.

Evidence of experiments made subsequently to the fire is admissible in order to show the way in which the building was set fire to.

JAMES HASELTINE was charged with arson. There were three counts in the indictment. The first and second were under sect. 3 of 25 & 26 Vict. c. 97, s. 1, and the third was under sect. 7 of that Act. The first count was for arson of a house, with intent to defraud. The second count was for arson of the house, with intent to injure. The third count was for arson of certain things in the said house under such circumstances as, if it had been arson of the house, it would have been a felony. There was no allegation of intent to defraud.

Leresche and Addison were for the prosecution.

Charles Russell, Q.C., and Hopwood were for the defence.

The prisoner kept a grocer's shop, situate at the corner of Deansgate and Fleet-street, in Manchester. Upon the day on which the alleged offence took place, somewhere between ten and eleven o'clock at night, an alarm reached the city fire-police station, which is situated not very far from the shop in question, viz., in Jackson's-row, that a fire was raging. A number of the brigade went to the spot, and found the shop in flames, the fire bursting out from the top of the shutters. The firemen immediately took such steps as soon enabled them to subdue the flames. Afterwards, Mr. Henderson, a police inspector, went over the premises, and examined the shop. In the centre of the shop, on the customers' side of the counter, where there was a pillar which supported a beam, a large number of boxes were

found, and particularly a large wooden one: this was all charred and burnt. The size of the box was about three feet by two, and in it were shavings, straw, lucifer matches, paper, chips of wood, and rubbish. The matches were not only in boxes, but there were a great number of them loose. On the top of the box was an old basket filled with similar stuff, and on the top of that was an old tub, which was packed in like manner. The boxes and tub, on being examined, smelled very strongly of paraffin oil. Among the contents were found a number of candle wicks and pieces of cotton fabric, which were wound in rolls, had been lighted at each end, and were saturated with paraffin oil. Whilst Mr. Henderson and Superintendent Tozer were on the premises prisoner walked in, and from something which Henderson said to Mr. Tozer, the latter drew prisoner into an adjoining room, where, in answer to a question, he said the box which had been found had been packed ready to be dispatched to a customer. Henderson then stepped in, and said, "Would you mind telling me who the customer is, Mr. Heseltine?" Prisoner replied, "Yes; the customer lives in Yorkshire." Henderson then further questioned him, and, in answer, he said the parcel was for his father, who lived at Snapes Castle, Bedale, Yorkshire. His father had written for it, but he had burned the letter. He never kept letters from home. He had made no invoice of the contents of the box, but he knew generally what it contained. He was not aware that he was insured; he might have thought so. It was not his shop, he was only a servant there for his brother, who was in Yorkshire, and had been in Manchester only for about two months. His brother paid him one pound a week for his services. His brother suffered very much from bad health, and was not able to be in Manchester much. During the conversation prisoner's brother Henry came in, and prisoner and his brother were informed that they would have to be taken into custody on suspicion of having set fire to the shop. Prisoner then said he had been to the circus, and left the shop about half-past eight o'clock. He went to the circus to meet some friends by appointment. Henderson remarked that prisoner was the last person seen on the premises, and that he locked the shop up. Prisoner acquiesced in this, and, in answer to a question, said he did not keep paraffin oil in the shop, and that he could not account for the smell. Afterwards, alongside the large box, a number of smaller ones, tea boxes, were found. Some of them were filled with chips and rubbish, and some were filled with tea. Next day, when the house and shop were gone over, the amount of stock and furniture was found to be exceedingly small, the valuation not reaching more than 300*l*. In July, 1871, prisoner effected a policy with the Royal Insurance Company for 600*l*, and the last premium he paid was in July, 1872. The policy was effected for 100*l*. on the household goods, and 100*l*. on the trade fixtures, and 400*l*. on stock, &c. Some invoices half burned were found in the shop, and they were mostly made out to John

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Heseltine. Two bills of exchange were found, which had been drawn upon and accepted by J. W. Heseltine; and Mr. Henderson had, since the occurrence, ascertained that the name of the prisoner was James Whetton Heseltine.

Mr. Henderson, in cross-examination by *Russell*, said he had made inquiries, and had found that prisoner's father did live at Snape Castle, and that he was a farmer. He also ascertained that prisoner's brother had been ill just before the fire, but he had not ascertained that he had been at the shop in question. He had found out the prisoner's brother's name was John, and that he was a draper, carrying on business at Bedale, Yorkshire.

John Moulton, a fireman, deposed to finding that the greatest amount of fire was in the centre of the shop. He asked prisoner how the box came to be in the middle of the shop filled with matches, and he replied that it had come in that day.

Mr. Superintendent Tozer, of the Manchester fire brigade, said that, on arriving at the shop on the night of the fire, at about thirty-five minutes past ten o'clock, he found in the centre of the floor a box, containing a basket and a tub, a quantity of shavings, some sawdust, a great quantity of lucifer matches, some in boxes and some loose, and several small bundles consisting of candle-wick and calico pinned together. The contents of the box were saturated with paraffin.

William Thompson, a chemist in the employ of Professor Calvert, said that he had examined several bundles which had been given to him by Badley. They were all soaked with mineral oil and grease. The first parcel contained pieces of cloth and candle wicks.

It was then proposed by the prosecution to give evidence of certain experiments made by Superintendent Tozer, of the fire brigade, with a view of showing the manner in which the house was set on fire; these experiments were made with candles of different lengths, prepared similarly to the candle-ends found in the *debris* of the fire; and their object was to support the theory of the prosecution that the fire had been planned, and everything set in train by the prisoner for its breaking out at the hour it did before he left the house.

Charles Russell objected to such evidence being admitted. But POLLOCK, B., ruled that it might be admitted.

The evidence was then given.

This closed the case for the prosecution.

Charles Russell now contended that the indictment ought to have averred how and in what manner the circumstances charged in the count in question arose; it was, therefore, bad for want of certainties. There was also no allegation of intent to defraud: the count was bad on this ground also.

Leresche said, it appeared to him the question on the third count was raised as a purely speculative question. The evidence was distinct on the first and second counts of the actual setting fire to the building itself. With regard to the third count, he

contended that it distinctly set forth the offence sufficient for the purpose of the Act.

His LORDSHIP said he would consult with Mr. Justice Archibald, who was sitting in the other court, on this matter, and retired for that purpose. On returning into court, he said Mr. Justice Archibald agreed with him in thinking that the count was good. He proposed that the evidence for the defence should be called, after which the jury could find upon each count.

Not Guilty.

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COURT OF QUEEN'S BENCH.

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REG. (on the prosecution of J. C. GRAVES) v. AUNGER.

Libel—Criminal information—Duty of relator to negative specific charge—General denial.

Where newspaper articles charged the relator with partiality from political motives, in the manner in which he discharged his duties as presiding officer at an election for members of a School Board, and mentioned a specific instance where he had rejected the vote of a duly qualified female voter, who was politically opposed to him, though the relator in his affidavit denied generally the truth of all the charges, and also denied that he refused any voter on political or improper or illegal considerations, or prevented directly or indirectly any voter, who was legally qualified to vote and who observed the prescribed regulations, from voting, or put any obstacles in the way, or did anything, at any time, calculated improperly to affect the election of any particular candidate.

The court discharged a rule nisi for a criminal information which had been obtained against the publisher of the newspaper, because the relator had not negatived specifically the charge made against him as to the rejection of the female voter's vote.

IN this case a rule nisi had been obtained by Sir J. B. Karslake, Q.C. calling upon Edmund Aunger to show cause why a criminal information should not be exhibited against him for certain libels upon John Coupland Graves, the relator, contained in articles published in a newspaper belonging to the said Edmund Aunger.

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It appeared from the affidavits that the relator, John Coupland Graves, was, on the 14th Aug. 1872, elected an alderman for the St. Aubyn ward of the borough of Devonport, and has since acted as alderman within that borough. On the 1st Nov. 1872, an election of a town councillor for the St. Aubyn ward of the borough took place, and Mr. Graves presided at the polling station of the ward at the Town Hall. On the 9th Nov. 1872, there appeared in *The Western Globe* newspaper, of which Mr. Aunger is the proprietor, the following paragraph with reference to the election :—

St. Aubyn Ward was contested in a manner worthy of the objects which prompted to action. With a perfectly new candidate, only issuing his address to the electors four or five days before the election, the ward was so ably worked as to bring the candidate within four votes of an old politician councillor, versed in all the arts of Radical tactics. There was also the disadvantage of putting forward one candidate only. Nor do we think it exactly in place for a presiding alderman, in addition to his legitimate duties, to be writing and sending out circulars to the voters in the ward of which he is chairman, to induce his party to vote. Has not the presiding alderman enough to do without thus acting the partisan in the way indicated? and is not such conduct sufficient to raise suspicion as to the impartiality which a presiding officer ought to maintain in discharging the duties of his office?

On the 6th Dec. 1872, an election of a member for the School Board of the borough of Devonport was held, at which Mr. Graves presided at the polling station, in the Town Hall. On the 14th Dec. in the same year, there appeared in *The Western Globe* an article commenting on the manner in which the election took place. The following was the article :—

RADICALS AS PRESIDING ALDERMEN.

Nothing could more forcibly prove the necessity of putting men of irreproachable character into public offices than the conduct of certain individuals in Devonport during the recent School Board election. Incidents which we are about to notice would never occur but that men are put into office, not for moral worth, but for the political services they have rendered their party. It is with pride we make the contrast between the two political parties; and, speaking locally, we can say that the conservatives of Devonport would be ashamed to do the mean and dirty tricks which the radicals are constantly perpetrating. At the late municipal elections we had occasion to call attention to the conduct of a presiding alderman, but mild remonstrances appear to be of no avail. Radicals can seldom be put to the blush unless their conduct is stigmatised to the full extent which it deserves. On the 1st Nov. last the same presiding alderman of whom we now complain, while supposed to be attending to the duties of his office, was constantly sending out letters and notes to voters of the ward, the contents of which none but his own party knew. It might be as to how the voting was proceeding, or influencing votes in some way or other. To say the least of such proceedings, they are in utter contravention of the law; and the man in such a responsible position who has been once guilty of this conduct ought not to be appointed to such duties again. On Friday last, the day of the election of a member for the School Board, the same presiding officer, who was joined by an accomplice, rejected the vote of a female, and compelled her to leave the polling booth. Having more spirit than many ladies she repaired to the residence of a friend of the candidate for whom she intended to vote. He returned with her to the booth; she insisted on the vote being taken, which was then done. We need scarcely say that the voter was politically opposed to the views of the presiding officer. There is reason to suppose that many other votes were rejected in the same way, the parties perhaps not knowing by what means to obtain redress. As we have before stated, a clear case of this kind, such as we are enabled now to produce, ought to be sufficient ever afterwards to preclude the same official from presiding on a similar occasion. Several obstacles were thrown in the way of opponents voting at other polling booths, which renders it difficult, if not almost an impossibility, for a hostile candidate to succeed, when the polling booths are presided over by an unprincipled man.

The paper of contents of *The Western Globe* of the same day contained, amongst other items, one in these words:—"Radicals as presiding aldermen. Trickery at polling booths."

On the 21st Dec. 1872, there appeared in *The Western Globe* a letter in the following words:—

To the Editor of *The Western Globe*. Sir,—It does seem a ridiculous thing for the ratepayers of Devonport to pay a clerk a large salary for legal advice, and when such a person is called on to give that advice, or to speak plainer, when he is asked to give his opinion (as Mr. Venning was last week on a most simple point of law, viz., whether or not the ratepayers of Devonport are bound to elect a certain public officer—I need hardly say that we have too many of them already) he either will not or cannot (perhaps the latter) give the answer required. Mr. Anstey's straightforward question deserved equally as straightforward an answer, instead of an evasive reply, and that too by a person of whom the councillors hear quite enough, and who, if he had to come to the ratepayers to be elected to the office he at present holds, would stand as much chance of election as "Van Dagrums;" I refer to Mr. J. W. W. Ryder. It seems that that gentleman acts as attorney or counsel, or as the local papers nominally style him, "Lord Chancellor" for certain public offices connected with this town. He must be a very liberal minded man, more so than I should have thought, to throw away all his talent for the benefit of other men's pockets; for I can assure you the Rads think him a great lawyer. The result of the last Council meeting on the whole is but one more instance of the exposure the Radicals have submitted themselves to in the eyes of the ratepayers, as being incompetent to deal with the affairs of the town honestly and fairly. Another proof of that was shown us by the exposure of the conduct of Alderman Graves (who knows more about drapery than the Ballot Act), of Wesleyan schoolroom notoriety, in refusing to take the vote of a supporter of Mr. Annger at the late School Board election. I should have thought, after the severe rubbing the Radicals received on the 1st Nov. last, they would not have tried to make matters worse for themselves; but they have done so; and let me tell them that the 1st Nov. 1873 will show a majority of conservatives in the council, when no notice will be taken of the mayor's snubbing remarks, when the affairs of the town will be managed by honest, trustworthy, and impartial men, and when the ratepayers' money will be expended usefully and economically. One word more and I have done. I hope if the Town Council can't get advice from their clerk when they want it, they would do the same as a private firm would under similar circumstances, and that is employ some one that can and will. I remain, Your obedient servant.—RATEPAYER.

Mr. Graves, in his affidavit, on which the rule *nisi* had been obtained, as to the allegations of misconduct in each of the publications above set out, stated as follows:—

It is wholly and entirely untrue that during the time I was presiding [at the election referred to in the publication of the 9th Nov. 1872]. I was either writing or sending, or causing to be written or sent, any letter or circular to the voters of the ward of St. Aubyn to induce them to vote, or that I acted the partisan in the way indicated in the said paragraph, or in any other way, nor did I in any way conduct myself otherwise than with entire impartiality at the said election in discharging the duties of my said office at the said election.

All and every the charges and imputations against me contained in the said paragraph are wholly untrue.

Throughout the election I acted according to the best of my judgment, and according to what I then believed and still believe to have been my public duty. I had no interest whatever in the result of the said election, and no bias or cause of bias in my mind for or against any of the candidates at the same, and I did not at any time do anything calculated improperly to affect the election of any particular candidate.

As to the publication of the 14th Dec. 1872, the affidavit of Mr. Graves stated as follows:—

I was not constantly sending out letters and notes to voters of the said Clowance Ward at the said School Board election, in order to tell them how the voting was proceeding, or to influence their votes in any way, nor did I send out any letters or notes, either to tell the voters how the voting was proceeding, or to influence their votes. I did not at any time improperly influence or attempt to influence votes at

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the said election for a member of the said School Board, nor did I at such election refuse any votes on political, or improper, or illegal considerations, nor did I prevent directly or indirectly any voter who was legally qualified to vote, and who observed the prescribed regulations, from voting at such election, nor did I directly or indirectly put any obstacles in the way of any voters voting at such election.

Throughout the said election for the School Board of the borough of Devonport, I acted according to the best of my judgment, according to what I then believed and still believe, to have been my public duty, I had no interest whatever in the result of the said election, and no bias or cause of bias in my mind for or against any of the candidates at the same, and I did not at any time do anything calculated improperly to affect the election of any particular candidates.

All and every of the said charges and imputations against me, contained in the said last mentioned article are wholly untrue.

The affidavit contained a denial in similar terms of the charge contained in the letters, signed "Ratepayer," which had been published in *The Western Globe*.

Mr. Aunger filed the following affidavit, sworn by himself, in reply :—

I am the secretary of the Conservative Association of the borough of Devonport, a member of the Town Council, and one of the Local Commissioners for the said borough.

John Coupland Graves is one of the most active members of the Liberal Association for the said borough, and states publicly that he is a nonconformist, and takes a very prominent part in all the public and political meetings in Devonport.

Previous to the 1st Nov. last the said John Coupland Graves, knowing I was secretary to the Devonport Conservative Association, called at my house with a view to effect certain compromises in reference to the then approaching municipal elections, and we discussed the subject freely.

On the 1st Nov. 1872, being the day of the municipal elections, the said John Coupland Graves was the presiding alderman for St. Aubyn Ward, and during the time he was so presiding several complaints were communicated to me, as the secretary of the Conservative Association, that the said John Coupland Graves, whilst taking the voting papers from the burgesses, was constantly writing notes, taking them out of the room, and sending them away, and from the fact of his being known as an unusually strong partisan, the secretary of the said ward and the agents of the conservative candidates, who were in the polling room during the time of election, considered such conduct highly indiscreet, and calculated to prejudice the interests of the conservative party, and in opposition to the spirit of the Parliamentary and Municipal Elections Act.

In consequence of the complaints of the conservative secretary of the said ward, and the agents appointed by the conservative candidates, and statements made to me by various other persons, I permitted the publication of the article referred to in the third paragraph of the affidavit of the said John Coupland Graves, fully believing the statements contained therein were true, and I deny that the said article was inserted in the said newspaper with any malicious feeling whatever against the said John Coupland Graves. It appeared to me, however, that the conduct of the said John Coupland Graves, as reported to me, constituted a legitimate subject of comment on the part of a public journalist.

Previous to the 6th Dec. 1872, I was a candidate to fill a vacancy in the School Board of Devonport, and during my candidature I was opposed most energetically by the said John Coupland Graves. I held several meetings in the borough for the purpose of making my views on the subject of education in public elementary schools known, and having previously obtained permission of the Wesleyan ministers and trustees to hold one of such meetings in one of their schoolrooms, I publicly advertised that such a meeting would be held. On the evening of the meeting the said John Coupland Graves attended with others, and at the time of the commencement of the meeting he endeavoured to prevent it being held, by stating publicly I had obtained possession of the room by false representations, and was not justified in making any statements there. The said John Coupland Graves obstructed the proceedings of the meeting, and great confusion took place. Amongst other things the said John Coupland Graves publicly stated that Mr. Walters (one of the trustees) had been to my house, and told me I had obtained the room under false pretences, which statement is untrue, as will appear on reference to the affidavit of the said Mr. Walters sworn in this matter.

The statements in question, with many others of a similar character, were printed in a handbill (a copy of which is now produced and shown to me, marked with the letter "A") which was posted about the town of Devonport, for the purpose of injuring me and damaging my prospect of being elected a member of the School Board.

The election of a member of the School Board took place the 6th Dec. 1872, when the said John Coupland Graves was appointed to preside over Clowance Ward as returning officer, although he was not at that time presiding alderman for any ward in the borough. During this election complaints were made to me by my agents and others that the said John Coupland Graves had refused to record the vote of a duly qualified burgess, and having reason to believe that such was the case, I made inquiry, when I found that the said John Coupland Graves had rejected such a vote, but, on being remonstrated with, subsequently recorded it. On the following Thursday (Dec. 12) a meeting of the Town Council was held, when I asked for an explanation of the conduct of the said John Coupland Graves, but my questions were ruled out of order, and the said John Coupland Graves did not make any reply to my statements.

The paragraph referred to in the eighth paragraph of the affidavit of the said John Coupland Graves was written without any malicious feeling whatever towards him, and the remarks contained in the article published on the 14th Dec. were mostly of a general character, and such expression as "disreputable persons" were intended to apply in general terms to the speakers at a meeting held on the 5th Dec. by the supporters of Mr. Mitchell, a candidate for the office of member of the Devonport School Board. At the meeting at which the said John Coupland Graves was present and took part, one of the speakers, a Mr. McKay, described me as not fit to sit with gentlemen on the School Board. Another speaker, Mr. J. W. W. Ryder stated he had never known me to make a practical suggestion for the benefit of the ratepayers; I was a man entirely unworthy the confidence of the ratepayers, and certainly not the man to sit with gentlemen on the School Board. The chairman also remarked that the Town Council of Devonport was a respectable body with one exception, and that exception was myself (the said Edmund Aunger). The said John Coupland Graves also spoke at the said meeting, and said he fully indorsed all the previous speakers had said.

In consequence of these remarks made at the meeting of the 5th, there was published on the following day, in a paper called *The Devonport Independent*, an article under the head of School Board Elections, in which appears the following:—"On the side of the denominationalists Mr. Aunger was selected as the candidate. The precise manner of the selection, however, was not made very clear, and a few mistrusted its straightforwardness, and disapproved of the man selected. Mr. Aunger gave the war whoop, and began to stump the wards. He first appeared at the Morice-street Wesleyan Schoolroom, where, to say the least, a very smoky effort was made to get the support of the Wesleyans. He was taken down considerably more than a peg, and administered a very severe rebuke, not merely in regard to the call of that particular meeting, but to the presumption of coming forward at all as a candidate, and especially to represent the more religious and respectable portion of the community. Never in the world was a man placed in a more ignoble position. Never had a man a more withering and contemptuous snubbing. It would have been a mortal blow to the life, much more to the candidature, of any man, whose dignity, self-respect, conscience, and principles, are not encased in a pretty thick shield, through which no contempt could penetrate."

From the date of the publication of the articles referred to in the third and eighth paragraphs of the affidavit of the said John Coupland Graves, down to the 30th Jan. last, I had not the slightest intimation from the said John Coupland Graves, or any one on his behalf, that he considered the said articles in anyway reflected on his character, or that he supposed he was in anyway injured by them. In fact the first intimation I received was through reading in the newspapers of the application he had made to the court for a rule to show cause why a criminal information should not be filed against me.

With reference to paragraph 12 of the affidavit of the said John Coupland Graves, I say that the letter therein referred to was inserted by the printer without my knowledge, and I only became aware of the contents whilst the paper was being printed. As soon as my attention was called to it I had the contents altered by the omission of the entire paragraph referring to Mr. Graves. This I did from a desire not to allow any further reference to the elections to be made, as I considered the elections being over the matter should be allowed to drop.

Another affidavit filed in opposition, that of Fanny Williams,

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stated that she was one of the burgesses of St. Aubyn ward, in the borough of Devonport; that at the municipal election on the 1st Nov. 1872, she attended at the polling booth for the said ward, and tendered her vote to John Coupland Groves, who there acted as presiding alderman, and who positively refused to receive her vote, although she was legally qualified to vote, which qualification she subsequently used by voting for Mr. Mitchell, a candidate for membership of the School Board, on which occasion no objection whatever was taken to her vote; that the said John Coupland Graves knew her personally, and knew that she was opposed to him in all political matters; that no change had taken place with reference to her qualification as a burgess, and that both elections were conducted upon the same roll or list of burgesses.

A further affidavit, that of Jane Treleaven Tippet, stated that she was one of the burgesses of Clowance Ward; that on the 6th Dec. 1872, the day of the election of a member of the School Board, she attended at the polling booth of the said ward, for the purpose of voting for Mr. Aunger, who was one of the candidates; that Mr. John Coupland Graves, who then acted as returning officer, said on her entering the booth, "The name?" and, as he did not say "your name," she thought he meant the name of the candidate for whom she intended to vote; and she replied "Aunger" as distinctly as possible; that he immediately replied, "There is no such name, and you are not entitled to vote;" that she then left the booth and made inquiries, and having procured a burgess list took it with her again into the polling booth, and pointed out her name to the said John Coupland Graves, who, after some hesitation, received her vote; that she was well known in the Clowance Ward, and never had any trouble in recording her vote on a former occasion; that she believed that the said John Coupland Graves knew when she said "Aunger" that she referred to the candidate's name, and not to her own, as she was an opponent of the political party of which the said John Coupland Graves was an active member, and that he must have been well aware that she was qualified to vote at the said election; that she has since heard of persons who mentioned the candidate's name instead of their own at the various polling booths, but whose votes were never refused on that ground; that from the hasty and abrupt answer of the said John Coupland Graves towards her she believed he intended taking advantage of her mistaking his question, and did not intend to record her vote.

Other affidavits filed in opposition related to the other matters referred to in the affidavit of Mr. Aunger above set forth.

H. James, Q.C. and *Pinder* showed cause against the rule, and contended that there was nothing in the article published on the 9th Nov. to justify the court in granting a criminal information. [BLACKBURN, J.—That might be so if the article of the 9th Nov. stood alone; but in the subsequent articles a specific and very grave charge is made.] A specific charge is contained in the

later articles that Mr. Graves rejected the vote of a workman who was duly qualified to vote, and who was opposed to his political views. To that specific charge Mr. Graves gives no specific denial in his affidavit, but only a general one, and that is not sufficient where a relator asks the interposition of this court in his favour, by granting a criminal information. As to the last publication complained of, the paper in which it was contained was suppressed by Mr. Aunger as soon as he was made acquainted with its contents, and an apology was made to the relator for it, before any proceedings were instituted on his behalf.

Sir *J. B. Karlake*, Q.C. and *Charles* in support of the rule were directed to confine their attention to the question, whether the relator had or had not brought fully before the court all the facts connected with the charge of rejecting the woman's vote. They contended that a sufficient denial was given to the charge by the words of the relator's affidavit, that he "did not refuse any votes on political, or improper, or illegal considerations," or "prevent directly or indirectly any voter who was legally qualified to vote, and who observed the prescribed regulations from voting," or "directly or indirectly put any obstacles in the way of any voters voting" at the election. [BLACKBURN, J.—But the charge made against him mentions a specific instance to which he does not allude.] The sting of the charge is that he acted from political and corrupt motives, and he denies that in any particular instance he did so. [BLACKBURN, J. referred to *Rex v. Haswell and Bate* (1 Doug. 387), where there was a charge of treason made against the Duke of Richmond, and the Duke having made an affidavit stating generally that the charges were false, scandalous, and malicious, one of the judges (Willes, J.) said he did not see how the court could make any distinction between the Duke and the lowest individual, and that there must be a specific denial of the particular charges; and the Duke was compelled to file another affidavit denying the charges specifically.] If the affidavit of the relator is insufficient, the court should give him permission to amend it. [BLACKBURN, J.—I think it is now too late to ask for that.]

BLACKBURN, J.—I think there is no doubt as to the course we ought to take in this case. As I stated the other day in the case of Mr. Plimsoll, a restriction is put on the power of the coroner or attorney to prefer a criminal information for libel in this court; that is to say, it must be done by leave of the court given in open court. That practice was first instituted in Lord Mansfield's time, and has for more than a century existed, and it has been found to be of great public benefit. Since that time this court has acted on the principle that in a matter like a criminal information, the object of which is to punish a man, the court will not grant it unless the circumstances are such as to show that the relator not only has the object in view of clearing his character, but that he is also a proper person to be entrusted with it, and that the circumstances are such as to render the proceedings a public benefit.

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When a relator has brought forward a charge against any one in this court, and has applied for a criminal information against him, and the court has granted the rule, the court has often subsequently discharged the rule on the party against whom the criminal information was asked apologising and paying the costs. But all persons in the position of relators, are, according to the practice which has existed for a long time, bound to satisfy the judges, who do not act on technical rules at all, but as men of the world and men of common sense, upon affidavits that they themselves are free from blame, and are fit and proper persons to be entrusted with the prerogative of this court, and they are to do that in the teeth of the other side, who have an opportunity on affidavit of persuading the court, if they can, that such persons are not so. We should deprive persons of that benefit, and put an end to the benefit if we did not in all cases adhere strictly to that rule. In Mr. Plimsoll's case we gave time to show by affidavits that he was free from blame, in order that the court might be quite secure, and that the applicant in the case (Mr. Norwood) should be able, if the rule should be made absolute, to say that Mr. Plimsoll had an opportunity of answering the matters alleged if he could, and of clearing his character. In the present case the party who has had to show cause has not satisfied us that that requisite has not been met. That being the object of the procedure upon a criminal information, it is of the highest importance that the relator should in all cases bring before the court all the circumstances fully and candidly, where there has been a specific charge, in order that the court may deal with the matter. Ever since the case of the *Queen v. Haswell*, the *Duke of Richmond's case* (1 Doug. 387), it has been the inflexible rule that the relator should negative the charges which are brought forward, but where the facts are such that he can negative the facts successfully, and he avoids doing that and passes over them lightly, the rule must be discharged and with costs. Now in this case I pass entirely over the article of the 9th of November, because although there may be something in that which is libellous, and probably a matter of action or a matter of indictment, I do not think it is of such gravity that the court would make the rule absolute upon a criminal information. Then on the 14th there was a specific charge made, which is so pointed that I think we should have said that it was a matter for a criminal information if the matter had come clearly before the court, and it had not been shown that there was something more. As to that, this is the statement in the article complained of: "On the 1st of November last, the same presiding alderman of whom we now complain, while supposed to be attending to the duties of his office, was constantly sending out letters and notes to voters of the ward, the contents of which none but his own party knew. It might be as to how the voting was proceeding or influencing votes in some way or other. To say the least of such proceedings, they are in utter contravention of the law, and the man in such a responsible position who had once been guilty

of this conduct ought not to be appointed to such duties again. On Friday last, the day of the election of a member for the School Board, the same presiding officer, who was joined by an accomplice, rejected the vote of a female, and compelled her to leave the polling booth. Having more public spirit than many ladies, she repaired to the residence of a friend of the candidate for whom she intended to vote. He returned with her to the booth; she insisted on the vote being taken, which was then done. We need scarcely say that the voter was politically opposed to the views of the presiding officer. There is reason to suppose that many other votes were rejected in the same way, the parties, perhaps, not knowing by what means to obtain redress. As we have before stated, a clear case of this kind, such as we are enabled now to produce, ought to be sufficient ever afterwards to preclude the same official from presiding on a similar occasion," &c. That is a very specific statement, and no doubt the gravamen of it is very serious. The gravamen of it is, that the presiding officer acted as a partisan in conducting the ballot, and a very serious imputation that is. It is pointed to a specific instance of a female being rejected, and then when she came back being admitted. Mr. Graves in his affidavit omits to make any statement in reference to that particular case. He does not say that he does not know who the female was, and that he cannot conceive who the female was, and that there is nothing that he remembers about the female, nor does he say what he did, if that was the case, or that a particular female came and he rejected her vote for such and such reasons, and afterwards set it right. But passing that over, he says this: "I did not at such election refuse to take the vote of any qualified supporter of Mr. Aunger, nor did I prevent any voter who was legally qualified to vote, and who observed in all respects the prescribed regulations, from voting at such election, nor did I put any obstacle in the way of any voter voting at such election." That is the general statement he makes. Now Miss Tippet comes forward and says that, on the day of the election of a member of the School Board, she attended at the polling booth for the purpose of voting for Mr. Aunger, who was one of the candidates; that Mr. J. C. Graves, who then acted as returning officer, said, on her entering the booth, "The name," and as he did not say "Your name," she thought he meant the name of the candidate for whom she intended to vote. She replied "Aunger," as distinctly as possible. He immediately replied, "There is no such name, and you are not entitled to vote." She then left the booth. She does not say she was turned out. There may be a little exaggeration in the other statement in consequence of the presiding officer's conduct. "I then left the booth and made enquiries, and having procured a burgess list, I took it with me again into the polling booth, and pointed out my name to the said J. C. Graves, who after some hesitation received my vote." Then she goes on to say, that she has heard of persons who mentioned the candidate's name instead of their

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own at various polling booths, but whose votes were never refused on that ground. Taking that to be true, there is a great deal of colour in the argument which has been addressed to us by Mr. James. But I do not go upon that ground and say that that is sufficient in itself, but upon the ground that Mr. Graves, knowing such detailed accusations had been made in the article of which he complained, ought to have stated all he knew about it; in which case probably this rule would not have been granted. He has not brought these details before us, and this rule must be discharged with costs.

QUAIN, J.—I am of the same opinion. If it is not the universal rule, it is the general rule where specific charges are brought that the party applying for the criminal information must deny the charge specifically, or give his reasons why he cannot deny it, or state on oath that he does not understand the imputation. Here Mr. Graves has done neither. He has not explained about neglecting this lady's vote, nor has he said that he is unable to recollect such a case. He has merely confined himself to a general denial that he never rejected for political reasons any vote of any person duly qualified to vote. It is clear that that is not a sufficient denial of the charge. It must be denied specifically, according to the rule laid down by Lord Mansfield in the case that my brother Blackburn referred to. We must adhere to that rule in this case, and therefore this rule will be discharged.

ARCHIBALD, J.—I am of the same opinion. When a party is assailed by a grave and serious libel, he has two courses open to him; he may either bring an action, in which case the defendant will be heard; or if the charge is of such a character that he is not to be satisfied with proceedings of that kind, he may apply to the court and waive his right of action. But I think it is a safe rule where he takes the latter course, to say that he must deal with perfect candour with reference to all the circumstances of the case, and he ought to make it appear not only that he is free from blame, but that his conduct is such that there is no colour for the imputations cast upon him. It cannot be said in this case, where a pointed charge of this kind is made, and his attention called to it, that that has been satisfactorily done. Therefore the rule must be discharged.

Rule discharged with costs.

Attorneys for relator, *Wedlake and Letts.*

Attorneys for Mr. Aunger, *Nelsons.*

COURT OF CRIMINAL APPEAL.

June 7, 1873.

(Before COCKBURN, C.J., BOVILL, C.J., KELLY, C.B., MARTIN, B., BRAMWELL, B., KEATING, J., BLACKBURN, J., MELLOR, J., PIGOTT, B., LUSH, J., BRETT, J., CLEASBY, B., GROVE, J., DENMAN, J., and ARCHIBALD, J.)

REG. v. MIDDLETON. (a).

Larceny—Parting with possession of money under mistake—Animus furandi.

A depositor in a post-office savings bank obtained a warrant for the withdrawal of 10s., and presented it with his depositor's book to a clerk at the post-office, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed that sum upon the counter. The clerk entered 8l. 16s. 10d. in the depositor's book as paid, and stamped it. The depositor took up that sum and went away. The jury found that he had the animus furandi at the moment of taking money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up, and found him guilty of larceny:

Held, by a majority of the Judges, that he was properly convicted of larceny.

Per Cockburn, C. J., Blackburn, J., Mellor, J., Lush, J., Grove, J., Denman, J., and Archibald, J., that the clerk, and therefore the Postmaster-General, having intended that the property in the money should belong to the prisoner through mistake, the prisoner knowing of the mistake, and having the animus furandi at the time, was guilty of larceny.

Per Bovill, C.J., Kelly, C.B., and Keating, J., that the clerk having only a limited authority under the letter of advice, had no power to part with the property in the money to the prisoner, and that therefore the conviction was right.

Per Pigott, B., that, before possession of the money was parted with, and while it was on the counter, the prisoner had the animus furandi, and took it up, and was therefore guilty of larceny.

Per Martin, B., Bramwell, B., Brett, J., and Cleasby, B., that the money was not taken invito domino, and therefore that there was no larceny.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Per Bramwell, B., and Brett, J., that the authority of the clerk authorized the parting with the possession and property in the entire sum laid down on the counter.

THE case and argument were published *supra*, p. 260, the decision having been announced before delivery of the judgments.

June 7.—Judgments of the Court were this day delivered.

BOVILL, C. J.—This was a case in which the prisoner was indicted at the Central Criminal Court for feloniously stealing money, the property of the Queen, or of the Postmaster-General.—On the trial he was found guilty, but a case was reserved for the opinion of the Court of Criminal Appeal, which came on in the ordinary course before five Judges; but on the argument they were not agreed, and the case was adjourned, to be argued before all the Judges. POLLOCK, B. was obliged to be absent at chambers, and QUAIN, J. was unwell, but the other Judges, fifteen in number, heard the case, and after time taken to consider, eleven of those fifteen Judges were of opinion that the conviction was right and ought to be affirmed: my brothers Martin, Bramwell, Brett and Cleasby dissented. Judgment was accordingly given in accordance with the opinion of the majority; but as it was thought important that the grounds of the decision should be accurately known, it was announced that the reasons of the judgments would on a subsequent day be delivered in writing.

I will now proceed to deliver the judgment of the Lord Chief Justice and of my brothers Blackburn, Mellor, Lush, Grove, Denman and Archibald, which is as follows:

The points raised by the case are in effect three. The uniform course of indictments for larceny, from the earliest times, has been to allege that the prisoner “feloniously stole, took, and carried away” the goods of a named person, and Lord Hale in his “Pleas of the Crown,” vol. i., p. 165, states with perfect accuracy that the words “feloniously stole and took” are essential to the crime. In the present case the jury have found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up. So far, therefore, as the guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty. But the case states facts which raise the doubt whether, under the circumstances stated, this was a “taking,” and also whether it was a “stealing” within the meaning put by the law on these averments in an indictment for larceny. The circumstances which raise that doubt are as follows:—Assuming that the clerk who actually was engaged in the transaction had such authority from the Postmaster-General that all he did is to be taken as done by the Postmaster-General, it is the first question whether the money can be said to have been *taken* by the prisoner within the meaning of the averment, inasmuch as the clerk (who on this

hypothesis is equivalent to the Postmaster-General) certainly meant that the prisoner should take up that money, though he only meant this because of a mistake he made as to the identity of the prisoner with the person really entitled to that money. Then a second question arises, whether it can be properly said that he stole the money, inasmuch as the clerk, and therefore on this hypothesis the Postmaster-General, intended that the property in the money should belong to the man before him, though he intended that in consequence of a mistake as to his identity, and the prisoner from the beginning knew of the mistake, and had at the time of the taking the guilty intention to steal the money. A third question arises in the event of the first two questions being determined in favour of the prisoner, viz., whether the clerk really had such general authority as to represent the Postmaster-General, or whether his authority was not limited to paying the money specified in the letter of advice, viz., 10s., which special authority, if it was so limited, he did not pursue. The majority of the judges, eight in number, have formed their judgment on the decision of the first two points in favour of the Crown, which therefore renders it unnecessary for them to decide the last. The Lord Chief Justice of the Common Pleas and the Lord Chief Baron and my brother Keating, who agree with the majority in thinking the conviction should be affirmed, do so solely on the last ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments. It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it at all. We now proceed to state the reasons on which we think it ought to be held that there was under the circumstances stated a "taking," within the meaning of the averment in the indictment. We agree that, according to the decided cases it is no felony at Common Law to steal goods if the goods were already lawfully in the possession of the thief, and that therefore at Common Law a bailee of goods, or a person who finds goods lost, and not knowing or having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge and a felonious intention, converts them to his own use. It is to say the least very doubtful whether this doctrine is either wise or just, and the Legislature in the case of bailees have by statute enacted that bailees stealing goods, &c., shall be guilty of larceny, without reference to the subtle exceptions engrafted by the cases on the old law, but in such a case as the present there is no statute applicable, and we have to apply the Common Law. Now we find that it has been often decided that where the true owner did part with the physical possession of a chattel to the prisoner (and therefore in one sense the taking of the possession was not against his will), yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the

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possession, it is a sufficient taking. We are not concerned at present to enquire whether originally the judges ought to have introduced a distinction of this sort, or ought to have left it to the legislature to correct the mischievous narrowness of the Common Law, but only whether this distinction is not now established, and we think it is. The cases on the subject are collected in "Russell on Crimes," 4th. Edit., vol. ii., p. 201. Perhaps those that most clearly raise the point are *Davenport's case* and *Savage's case*, (2 Russell, 201.) In the present case the finding of the jury, that the prisoner at the moment of taking the money had the *animus furandi*, and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the *possession* of the money. On this part of the case, there is no difference of opinion. On the second question, namely, whether (assuming that the clerk was to be considered as having all the authority of the owner), the intention of the clerk (such as it was) to part with the *property* prevents this from being larceny, there is more difficulty and there is in fact a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follow: At Common Law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery, and it is clear from the very nature of the thing that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean and how this is material. Now it is established that where a bargain has been made between the owner of a chattel and another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber in *Olough v. London and North-Western Railway Company* (7 L. Rep. Exch. 34), where it is said, "We agree completely with what is stated by all the Judges below, that the property in the goods passed from the London Pianoforte Company to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. . . . We think that so long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind." It follows obviously from this, that no conversion or dealing with the goods before the election is determined can amount to a stealing of the

vendor's goods, for they had become the goods of the purchaser and still remained so when the supposed act of theft was committed. There are accordingly many cases, of which the most recent is *R. v. Prince* (11 Cox. C. C. 193), which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences, and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a forged cheque payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property. In the present case the property still remained that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him; for there was no intention to give it him or anyone. It was simply a handing it over by a pure mistake, and no property passed. As this was money we cannot test the case by seeing whether an innocent purchaser could have held the property; but let us suppose that a purchaser of beans goes to the warehouse of a merchant with a genuine order for so many bushels of beans, to be selected from the bulk, and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant, on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not, and that on the principle enunciated by Lord Abinger, in *Chester v. Hopkins* (4 M. & W. 404), when he says "If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty: there is no warranty that he should sell him peas, the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it." We admit that the case is undistinguishable from the one supposed in the argument of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this—whether, at the time he took the sovereign, he was aware of the mistake, and had then the guilty intent, the *animus furandi*. But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being larceny, though the intention was inoperative and no property passed. In almost all the cases on the subject the property had actually passed, or at least the Court thought it had passed; but two cases, *Reg. v. Adams* (1 Den. C. C. 38), and *Reg. v. Atkinson* (2 East. P. C. 673), appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative,

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was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principle these cases can be supported, if *Davenport's case* and the others involving the same principle are law; and, though if a long series of cases had so decided we should think we were bound by them, yet we think that in a Court such as this, which is in effect a Court of Error, we ought not to feel bound by two cases which, as far as we can perceive, stand alone, and seem to us contrary both to principle and justice.

BOVILL, C. J., then read his own judgment, in which KEATING, J. concurred.—The proper definition of larceny according to the law of England, from the time of Bracton downwards, has been considered to be the wrongful or fraudulent taking and carrying away by any person of the personal goods of another from any place, without any colour of right, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent and against the will of the owner; and the question for our consideration is, whether the facts of the present case bring it within that definition. Under the Act for establishing Post-office Savings-Banks (24 Vict. c. 14), deposits are received at the Post-offices authorized by virtue of that Act, for the purpose of being remitted to the principal office (sect. 1). By sect. 2 the Postmaster-General is to give an acknowledgement for such deposits and by the 5th section all moneys so deposited with the Postmaster-General are forthwith to be paid over to the Commissioners, for the reduction of the National Debt. By the same section all sums withdrawn by depositors are to be repaid out of those moneys through the office of the Postmaster-General; and by sect. 3 *the authority of the Postmaster-General for such repayments shall be transmitted to the depositor*, who is to be entitled to repayment at a post-office within ten days. It appears to us that the moneys received by the Postmasters at their respective offices, by virtue of this Act, are the property of the Crown or of the Postmaster-General, and that neither the Postmasters nor the clerks at the post-offices have any power or authority, either general or special, to part with the property in or even the possession of, the moneys so deposited, or any part of them, to any person, except upon the special authority of the Postmaster-General. In this case the prisoner had received a warrant or authority from the Postmaster-General entitling him to repayment of 10s. (being part of a sum of 11s. which he had deposited) from the post-office at Notting-Hill, and a letter of advice to the same effect was sent by the Postmaster-General to that post-office, authorizing the payment of the 10s. to the prisoner. Under these circumstances we are of opinion that neither the clerk to the postmistress nor the postmistress personally had any power or authority to part with the five-pound note, three sovereigns, the half-sovereign, and silver and copper, amounting to 8l. 16s. 10d., which the clerk placed upon the counter and which was taken up by the prisoner. In this view

the present case appears to be undistinguishable from other cases where obtaining articles *animo furandi* from the master of a post-office, though *he had intentionally delivered them over to the prisoner*, has been held to be larceny, on the principle that the Postmaster had not the property in the articles, or the power to part with the property in them. For instance the obtaining the mail-bags by pretending to be the mail-guard, as in *Reg. v. Pearse* (2 East. P. C. 603), the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in *Reg. v. Kay* (D. & B. 231; 7 Cox C. C. 298), (where *Reg. v. Pearse* was relied upon in the judgment of the Court), and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in *Jones's case* (1 Den. 188), and in *Reg. v. Gillings* (1 F. & F. 36), were all held to be larceny. The same principle has been acted upon in other cases where the person having merely the *possession* of goods, without any power to part with the *property* in them, has delivered them to the prisoner, who has obtained them *animo furandi*; for instance, such obtaining of a parcel from a *carrier's servant*, by pretending to be the person to whom it was directed, as in *Reg. v. Longstreet* (1 Mood. C. C. 137), or obtaining goods through the *misdelivery* of them by a *carman's servant*, through mistake to a wrong person, who appropriated them *animo furandi*, as in *Reg. v. Little* (10 Cox C. C. 559), were in like manner held to amount to larceny. In all these and other similar cases, many of which are collected in 2 Russell on Crimes, 211 to 215, the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant to whom the property had been entrusted for a special purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it, and feloniously to appropriate it to himself, he may in our opinion be properly convicted of larceny. The case is very different where the goods are parted with by the *owner* himself, or by a person having authority to act for him, and where he or such agent intends to part with the property in the goods, for then, although the goods be obtained by fraud, or forgery, or false pretences, it is not a taking against the will of the owner, which is necessary in order to constitute larceny. The delivery of goods by the owner upon an order which was in fact forged, as in *Reg. v. Adams* (1 Den. 38), the payment of money by a banker's cashier on a cheque which turned out to be a forgery, as in *Reg. v. Prince* (11 Cox C. C. 193), and the delivering up of pledges by a pawnbroker's manager by mistake, and through fraud, as in *Reg. v. Jackson* (1 Mood. 119), are instances of this kind, and where the intent voluntarily to part with the property in the goods by a person who had authority to part with the property in them prevented the offence being treated as a larceny. In the present case not only had the postmistress or her clerk no power or authority to part with the property in this money to the

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prisoner, but the clerk in one sense never intended to part with the 8*l.* 16*s.* 10*d.* to the person who presented an order for only 10*s.*, and he placed the money on the counter by mistake, though at the time he (by mistake) intended that the prisoner should take it up, and by mistake entered the amount in the prisoner's book. When the money was lying upon the counter the prisoner was aware that he was not entitled to it, and that it could not be, and was not really intended for him, yet, with full knowledge on his part of the mistake, he took the money up and carried it away, intending at the time he took it to deprive the owner of all property in it, and feloniously to appropriate it to his own use. There was, therefore, as it seems to us, a wrongful and fraudulent taking and carrying away of the whole of this money by the prisoner, without any colour of right, *animo furandi*, and against the will of the real owner. For these reasons and upon the authorities before stated, we think the prisoner was properly convicted of larceny.

KELLY, C.B.—The facts of this case, simply stated, are these. The prisoner, having deposited 10*s.* in the Post-office Savings Bank, and taken the necessary steps to withdraw it, proceeded to the post-office and presented his order for the 10*s.* The post-office clerk having looked at the letter of advice for the payment of the 10*s.* and at another letter of advice for the payment to another depositor of 8*l.* and a fraction, by mistake took up the 8*l.* odd destined for the other depositor, and laid it upon the counter before the prisoner, who took up the money and went away with it, and applied it to his own use. The jury expressly found that he knew the 8*l.* odd did not belong to him, and that it did belong to the Postmaster-General, and that he took it up and carried it away with him *animo furandi*. Upon these facts, and this finding, I cannot bring myself to doubt that the prisoner was guilty of larceny. He saw the money upon the counter before him; he knew that it was not his own, and that it was another person's money, and he took it up and took it away with the intent to steal it. If he had gone into the office knowing that he had to receive 10*s.*, and that somebody had to receive 8*l.*, and he had seen the 10*s.* and the 8*l.* lying upon the counter before him, and had taken away the 8*l.* *animo furandi*, no question could have been raised about his guilt. Does it then make any difference that the clerk placed the money before him and intended that he should take it? If the money had belonged to the clerk, and the clerk had intended to pass the property in the money from himself to the prisoner, or if, the money belonging to the Postmaster-General or the Queen, the clerk had been authorized to pass the property *in that money* to the prisoner, the case might have been different. But this money did not belong to the clerk, and he had no authority to pass the property *in the money* to the prisoner. *R. v. Prince* was cited, where a banker's clerk, to whom a forged cheque was presented, paid the money in ignorance of the forgery, and the receiver, who intended to defraud

the banker of the money, was acquitted of larceny on the ground that the clerk had authority to receive the cheque and to dispose of the money which he had paid to the prisoner, and was the agent of the banker in so doing; so that the case was the same as if the banker himself, who was the owner of the money, had delivered it to the prisoner. There, however, the clerk was not only the agent of the banker, but he acted strictly in the discharge of his duty, for he had not only the authority of his employer to pay the money, but in the absence of any suspicion, or reason to suspect, that the cheque was forged, it was his duty to pay it, and he did pay it with the banker's money. And there are other cases where the owner of a chattel delivers it to another with the intent to pass the property, and the receiver has been acquitted of larceny. But in this case the post-office clerk was not the owner of the 8*l.*, and had no authority whatever to deliver that sum of money to the prisoner, which is precisely the case excepted in the judgment of the *Queen v. Prince*, and brings it within the *Queen v. Longstreeth* therein cited. The case appears to me to be the same (indeed I suggested it during the argument) as if the prisoner had left a watch at a watchmaker's to be repaired, and afterwards goes to the watchmaker's, where he sees his watch hanging up behind the counter, and another watch of greater value, and belonging to another person, hanging beside it, and upon his asking for his watch, the shopman, by mistake, hands him the watch belonging to the other person. He sees his own watch; he knows that the watch handed to him does not belong to him, but is the property of another, and that the shopman has no authority whatever to deliver the watch of another to him. I have no doubt, therefore, that one who had so received and taken away another man's property would have been guilty of larceny, and that the shopman in such a case and the clerk in this case is in the condition of a mere stander-by, who, without authority and by mere mistake, hands to him a chattel which he sees before him. Even *Prince's case* may be said to be founded on a fiction, for it is not true that the banker had authorized his clerk to pay his money upon a forged cheque; but the fiction is more undisguised and palpable when it is asserted that the clerk was authorized by the Postmaster-General to pay the sum of 8*l.* to a man who had presented an order or warrant for 10*s.* And I must take leave to record my deliberate opinion that the creating of fictions, which, as the term imports, is the assuming to be true that which is untrue, and of which the direct consequence is to defeat justice, is a practice which, in administering the law, ought not to be extended. Moreover, this case is distinguishable from *Prince's case* on the ground of the decision in *Reg. v. Longstreeth*, where a carrier's servant delivered a parcel to one who received it *animo furandi*, knowing it not to be his own, and it was held that he had no authority to deal with the property in the goods, but only with the possession, and that the receiver was guilty of larceny. I think that decision

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governs the present case, and conclusively shows that if a servant delivers to the wrong person a chattel which it was no part of his duty, and which he had no authority to deliver to any but the owner, and the receiver takes it, knowing it is not his but belongs to another, and *animo furandi*, such receiver, although the delivery is made in the ordinary performance of the duty of the servant, is guilty of larceny. Upon these grounds I think the conviction should be affirmed.

MARTIN, B.—I have read the judgments of my brothers, Bramwell, B. and Cleasby, B., and fully concur in them. I think that upon the facts and on the principles of the Criminal Law there was no larceny committed in this case. In my judgment the case of *Reg. v. Prince* is not distinguishable from this case. There the prisoner committed a more gross offence, and yet the Court held it not to be larceny. The true principle of larceny is to be found in Coke's 3rd Instit. 107: "Larceny is the felonious and fraudulent taking and carry away by any man or woman of the mere personal goods of another, neither from the person nor by night in the house of the owner." And, "Secondly, there must be an actual taking, for an indictment *quod felonice abduxit æquum* is not good because it wanteth *cepit*: by taking, and not bailment, or delivery, for that is a receipt, and not a taking: and therewith agreeth Glanvil." The cases collected in 2 Russ. on Crimes shew that there must be a taking, and it is essential to the crime of larceny that the act of taking should be a trespass. In my opinion what the prisoner did was not taking in that sense, and not a trespass, but only a receipt. The civil remedy to recover back the money would have been trover and not trespass.

BRAMWELL, B.—As the prisoner has now undergone his nominal sentence, I should think it better that the small minority in this case, of whom I am one, should give up their opinions to the majority, if the case turned on its own particular circumstances, and no principle was involved. But, in my opinion, great and important principles, not only of our law, but of general jurisprudence, arise here, on which I feel bound to state my views. It is a good rule in criminal jurisprudence not to multiply crimes; to make as few matters as possible the subject of criminal law; and to trust, as much as can be, to the operation of the civil law for the prevention and remedy of wrongs. It is also a good rule not to make that a crime which is the act or partly the act of the party complaining—*volenti not fit injuria*—as far as he is willing let it be no crime. Here the taking was consented to. This is undoubtedly a rule of the English Common Law. Obtaining goods by false pretences was no offence at common law. Ordinary cheating was not. Embezzlement by a servant was not larcenous. Breaches of trust by trustees and bailees were not; so also fraudulently simulating the husband of a married woman, and having connection with her was not. And most particularly was and is this the case in larceny, for the definition of it is that the taking must be "*invito domino*." Whether this law is good or bad is

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not the question. We are to administer it as it is. I think those statutes that have made offences of such matters as I have mentioned improved the law, because the business of life cannot be carried on without trusting to representations that we cannot verify, and without trusting goods to others in such a way that the owner loses all power of watching over them; and it is reasonable that the law should protect persons who do so, by making criminals of those who abuse that confidence. But something was to be said in favour of the old law, viz., that the opportunity for the crime was afforded by the complainant. Further, there is certainly a difference between the privy taking of property without the knowledge of the owner, or its forcible taking, and its taking with consent by means of a fraud. The latter perhaps may properly be made a crime, but it is a different crime from the other taking. I say, then, that on the principles of general jurisprudence, on the general principles of our law, and on the particular definition of larceny, the taking must be *invito domino*. That does not mean contrary to or against his will, but without it—all he need be is *invitus*. This accounts for how it is that a finder of a chattel may be guilty of larceny. The *dominus* is *invitus*. So in the case of a servant who steals his master's property. There are certain cases apparently inconsistent with this, but which are brought within the rule, but by reasoning which ought to have no place in criminal law. I mean such cases as where a carrier broke bulk and stole the contents or part, and was guilty of larceny, but would not have been had he taken the whole package; and cases where possession was fraudulently obtained *animo furandi* from the owner, who did not intend to part with the property. In such cases it has been held that the breach of trust by the carrier in breaking bulk revested the possession in the owner; and in the other case, the obtaining of possession was a fraud and so null, and that therefore in such cases the possession reverted to or remained in the true owner, and so there was a taking *invito domino*. So also cases where the custody is given to the alleged thief, but not possession, or property, as where the price of a chattel delivered is to be paid ready money: (*R. v. Cohen*, 2 Den. 249.) These are not exceptions to the rule, but are brought within it by artificial, technical, and unreal reasoning. But where the *dominus* has voluntarily parted with the possession, *intending to part with the property* in the chattel, it has never yet been held that larceny was committed, whatever fraud may have been used to induce him to do so; nor whatever may be the mistake he committed; because in such case the *dominus* is not *invitus*. So also where the possession has been parted with in such way as to give the bailee a special property: (See 2 Russell on Crimes, 191, citing 2 East P. C. 682; *R. v. Smith*, R. & M. C. C. R. 473; *R. v. Goodbody*, 8 C. & P. 655.) It is not necessary that the property should pass; the intent to pass it is enough (see *R. v. Coleman*, 2 East, P. C. 672, 2 Russell 200). It is clear that the property did not pass in that case, even voidably—not

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to the prisoner, because the prosecutor's contract was not with him, nor to Mrs. Cook, for it was not with her. The same remark applies to *Adams's case* (2 Russell, 200); see also *Atkinson's case* (2 Russell, 207). The principle of that case seems misunderstood in the text. It is cited as a case where the property passed, but it is clear no property passed to anyone. It is argued that here there was no intent to part with the property, because the post-office clerk never intended to give to Middleton what did not belong to him. A fallacy is involved in this way of stating the matter. No doubt the clerk did not intend to do an act of the sort described, and give to Middleton what did not belong to him. Yet he intended to do the act he did. What he did he did not do involuntarily, nor accidentally, but on purpose. See what would follow from such reasoning. A. intends to kill B.; mistaking C. for B., he shoots at C. and kills him. According to the argument, he is not guilty of intentional murder, not of B., for he has not killed him, nor of C. for he did not intend to kill him. There is authority of a very cogent kind against this argument. A man, in the dark, gets into bed to a woman, who, erroneously believing him to be her husband, lets him have connection with her. This is no rape, because it is not without her consent; yet she did not intend that a man not her husband should have connection with her. I have noticed the above as another illustration of how the common law refuses to punish an act committed with the consent of the complainant. To proceed with the present matter,—If the reasoning as to not intending to give this money is correct, then, as it is certain that the post-office clerk did not intend to give Middleton 10s., it follows that he intended to give him nothing. That cannot be. In truth, he intended to give him what he gave, because he made the mistake. This matter may be tested in this way: A. tells B. he has ordered a wine merchant to give B. a dozen of wine. B. goes to the wine merchant, *bonâ fide* receives and drinks a dozen of wine. After it is consumed the wine merchant discovers he gave B. the wrong dozen, and demands it of B., who, having consumed it, cannot return it. It is clear the wine merchant can maintain no action against B., as B. could plead the wine merchant's leave and license. But it is said that if B. knew of the mistake, and took the wine *animo furandi*, then he would have taken it *invito domino*. So that whether the *dominus* is *invitus* or not depends, not on the state of of his own mind, but on that of B. It is impossible to say that there was a taking here sufficient to constitute larceny, because the money was picked up; but if it had been put in the prisoner's hand there was not such a taking. But for the point, then, I am about to mention, I submit the *dominus* was not *invitus*, that he consented to the taking, and that it was partly his act. No doubt the prisoner was a dishonest man—may be what he did ought to be made criminal—but his act was different from a privy or forcible taking; he was led into temptation, the prosecutor had very much himself to blame, and I certainly think that Middleton,

if punished, should be so on different considerations from those which should govern the punishment of a larcenous thief. But a point is made for the prosecution on which I confess I have the greatest doubt. It is said that here the *dominus* was *invitus*—that the *dominus* was not the post-office clerk, but the Postmaster-General, or the Queen, and that therefore it was an unauthorised act in the Post-office clerk, and so a trespass in Middleton *invito domino*. I think one answer to this is, that the post-office clerk had authority to decide under what circumstances he would part with the money with which he was entrusted. But I also think that, for the purposes of this question, the lawful possessor of the chattel, having authority to transfer the property, must be considered as the *dominus*, at least when acting *bonâ fide*. It is unreasonable that a man should be a thief or not, not according to his act or intention, but according to a matter which has nothing to do with them, and of which he has no knowledge. According to this, if I give a cabman a sovereign for a shilling by mistake, he taking it *animo furandi*, it is no larceny; but if I tell my servant to take a shilling out of my purse and he by mistake takes a sovereign and gives it to the cabman, who takes it *animo furandi*, the cabman is a thief. It is ludicrous to say that if a man, instead of himself paying, tells his wife to do so, and she gives the sovereign for a shilling, that the cabman is guilty of larceny, but not if the man gives it. It is said that there is no great harm in that a thief in mind and act has blundered into a crime. I cannot agree. I think the Criminal Law ought to be reasonable and intelligible. Certainly a man who had to be hung owing to this distinction might well complain; and it is to be remembered that we must hold that to be law now which would have been law when such a felony was capital. Besides, juries are not infallible, and may make a mistake as to the *animo furandi*, and so find a man guilty of larceny when there was no theft and no *animus furandi*. Moreover, *Prince's case* is contrary to this argument, for there the bankers' clerks had no authority to pay a forged cheque if they knew it. They had authority to make a mistake, and so had the post-office clerk. And suppose in this case the taking had been *bonâ fide*. Suppose Middleton could neither write nor read, and some one had made him a present of the book without telling him the amount, and he had thought the right sum had been given to him, would his taking of it have been a trespass? I think not, and that a demand would have been necessary before an action of conversion could be maintained. No doubt the cases on this point are difficult, but I think not inconsistent with this opinion. In *Longstreeth's case* (3 Russ. 203), the servant had no authority to change property in the thing delivered. So in *Wilkins' case* (3 Russ. 211). In *Small's case* (*id.* 213), the servant had authority to part with the possession only if he got a good half-crown. and the prisoner knew that. So in *Stewart's case* (1 Cox C. C. 174), where the reasoning of Alderson, B., is very important.

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In *Shepherd's case* (9 C. & P. 121), the servant had no authority to sell the mare, and the prisoner, his confederate, knew the mare was not the property of the servant. So in *Hench's case* (2 Russ. 215), the servant had no authority to pass the property. As to *Pearse's case* (2 East P. C.), there was no intention to pass the property. As to *R. v. Kay* (2 Russ. 217), the reasoning by which the conviction is justified is, I repeat, such as ought not to exist in any law, most especially not in the Criminal Law. But, as it is said in the note to that case, there was no intention to part with the property. On these grounds I think the conviction was wrong. I need not profess my respect for those whose opinions are the contrary, but I feel bound, as I have said, to express mine, because I think very important principles are involved, and because I think it desirable to shew that those whose opinions I share may be (and probably are) in the wrong, considering the numerous and weighty reasons the other way. There is more doubt in the case than has appeared to some who seem to me to reason thus: The prisoner was as bad as a thief (which I deny); and being as bad, ought to be treated as one (which I deny also). To such reasoners I give the recommendation contained in an excellent article in the *Law Times* of Jan. 25th, 1873, p. 228, where it is said "A Metropolitan County Court Judge might with advantage read and inwardly digest Paley's Moral and Political Philosophy, or some approved treatise, in which the necessity for positive rules of general application, the doctrine of 'particular and general consequences,' and the superior importance of and regard due to 'general consequences' are already expounded."

PIGOTT, B.—I agree in the judgment of the majority of the Court; except that I do not adopt the reasons which are there assigned for holding that the mistaken intention of the clerk did not under the circumstances here prevent the case from being one of larceny on the part of the prisoner. I quite accede to that proposition, but my reason is that, in the view I take of the facts, the intention and acts of the clerk are not material in determining the nature of the prisoner's act and intent; because the transaction between them stopped short of placing the money completely in the prisoner's possession, and could in no way have misled the prisoner. The case states, the clerk placed the money on the counter. He then entered the amount of it in the prisoner's book and stamped it. This no doubt gave the prisoner the opportunity of taking up the money, and he did so in the presence of the clerk; but before doing so he must have seen by the amount that the clerk was in error and that the money could not really be intended in payment of his order, and therefore was not for him, but for another person. It was with full knowledge of this mistake that he resolved to avail himself of it and, in fact, to steal the money. The interval afforded him the opportunity, and he did in fact conceive the *animus furandi*, while as yet he had not taken the money in his manual possession. The dividing line may appear

to be a fine one ; but it is, I think, very distinct and well defined in fact, for it was with this formed intention in his mind that he took possession of the money. If complete possession had been given by the clerk to the prisoner, so that no act of the latter were required to complete it after his discovery of the mistake and his own formed intention to steal it, I should not feel myself at liberty to affirm this conviction. In that case the prisoner would have done nothing to defraud the clerk, and the latter intending (to the extent to which he had such intention) as much to pass the property as the possession in the money, there would be nothing to deprive the matter of the character of a business transaction fully completed. I desire to adhere to the law stated in the 3rd Institute, p. 110 :—"The intent to steal must be when it cometh to his hands or possession ; for if he hath the possession of it once lawfully, though he hath *animus furandi* afterwards and carrieth it away, it is no larceny." But the facts satisfy me, and the jury have found upon them, that the prisoner had the *animus furandi* while the money was yet on the counter, and that at the moment of taking it up he knew the money to be the Postmaster-General's. The case is therefore very much like that of a finder who immediately on finding it knows or has the means of knowing the owner and yet determines to steal it: (2 Russell, 169.) The same facts satisfy the requirements in the definition of larceny, that the taking must be *invito domino*. The loser does not intend to be robbed of his property, nor did the clerk in this case ; and the prisoner's conduct is unaffected by the clerk's apparent consent, in ignorance of its real nature. I therefore agree in affirming the conviction.

BRETT, J.—This case has been considered in three different ways. It has been said that a proper inference of fact to be drawn from the facts stated is, that the prisoner took and carried away the money without any consent to his so doing by the clerk, who was present, and that in such case the same rule of law is applicable as would be if the prisoner had taken and carried away the money in the absence of the clerk, and that the prisoner was therefore properly convicted. It has been said that the facts which are stated shew that, as a matter of fact, the clerk in this case had no general authority to part with the property in the money entrusted to him on behalf of the Postmaster-General, but only a limited authority to part with a particular sum of money to the prisoner, which was not the sum of money he did part with, or to hand a sum similar to that which he in fact handed to the prisoner to some one else and not to the prisoner, and that consequently the prisoner was by law properly convicted of larceny, even though the clerk intended the prisoner to take and keep the money, or, in other words, even though the clerk intended to part with both the possession of and the property in the money. It has been said that even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster-General if he

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had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted, because no property in the money did in point of law at any time pass to the prisoner. Any difference of opinion as to the first proposition can only arise upon a difference of view as to the proper inference of fact to be drawn. And I think also that the only difference of opinion with regard to the second proposition is a difference as to the true interpretation of the clerk's authority as matter of fact. But the difference as to the last proposition is a difference as to the criminal law. The difference of opinion that has arisen upon that proposition makes it necessary, as it seems to me, to refer to the definition of larceny, and to point out the exact part of that definition which is in question. The definitions which have been generally, and, until now I think universally, accepted are, that "larceny consists in the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use and make them his own property, *without the consent of the owner,*" and again "the felonious taking the property of another *without his consent and against his will,* with intent to convert it to the use of the taker." The indictment for larceny is invariably founded upon these definitions, and comprises by necessary inference, if not in express terms, every part of them. It has always been held that each allegation of each part of these definitions is a material allegation in the indictment, and that every one of such allegations must be proved. Where criminal law is so accurately and so mercifully administered as it is in England, and with so firm a determination that no man shall be convicted of crime unless the prosecutor can prove that the case is brought in every particular within the recognised or enacted definition of the crime, it was to be expected that there would be, and it is the fact that there have been, critical decisions on every part of the definition of the crime of larceny. To some people such decisions appear to be subtle; to others carefully and rightly accurate. One part of the definition is that the taking relied upon as the stealing should be a taking "without the consent and against the will of the owner." That is the part of the definition which is in question in this case. It has always been held to be a necessary part of the definition. "Besides the *animus furandi* it is necessary that the taking of the goods should also be without the consent of the owner," "*invito domino:*" (2 Rus., Crimes, 189, ed. 4.) This is of the very essence of the crime of larceny, as well as essential in robbery. The cases quoted are, as to robbery, *Reg. v. McDaniel* (Fost. 121), and as to larceny, *Reg. v. Egginton* (2 Leach, 913). Where the taking which is alleged to be felonious has occurred without the knowledge of the owner or of the person in charge, no difficulty can arise upon this part of the definition. The difficulties which have arisen have been where the goods have been delivered to the prisoner

or have been taken by the prisoner with the consent of, the owner or of the person in charge. In such cases a distinction has been made between the terms "delivery," "possession," and "property." Where the goods are obtained by the prisoner by willing delivery of them to him by the owner, the first proposition of law which has been affirmed is as follows: "If it appear that, although there is a *delivery* by the owner in fact, yet there is clearly no change of property, nor of *legal possession*, but the *legal possession* still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made. Thus, if a person to whom goods are *delivered* has only the *bare charge* or *custody* of them and the *legal possession* remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use." The next received proposition is thus stated: "Where there is a delivery of the goods by the owner, it is a settled and well-established principle, that if the owner part with the property in the goods taken, there can be no felony in the taking, however fraudulent the means by which such delivery was procured." And, according to the Common Law, if the owner had not parted with the property in the goods, but only with the *possession* of them, the question of larceny remains open, and depends on the fact whether at the time of the alleged felonious taking the owner parted with the *possession* of the goods in such a manner and to such an extent as to exclude the idea of trespass. If the possession be obtained by fraud, there may be larceny, assuming that the other parts of the definition are fulfilled. If the possession be obtained without fraud, the taking by which the possession is obtained cannot be treated as a taking by trespass, and, consequently, not as a taking without the consent of the owner. The propositions thus expressed leave open a question as to whether they mean that the property in the goods has passed in consideration of law, or whether they mean that "it was the intention of the owner that the property should pass." Now they are addressed to the question whether the thing alleged to have been stolen was taken "without the consent of the owner." Consent or non-consent is an action of the mind; it consists exclusively of the intention of the mind. These propositions, therefore, are treating of a question of intention. If it be said that a man intends to part with the property in a thing which he delivers to another, the meaning of the words is, that he intends that the other should take the thing and keep it as his own. It seems a contradiction in sense to say that the thing so delivered is taken from him "without his consent." It seems to follow that the real meaning of the proposition, when they speak of the owner parting with possession or parting with the property, is as if they were written, "if the owner intend to part with the possession, or intend to part with the property." All the cases are consistent with this view, though it is not expressed in terms in all. In *Reg. v. Harvey* (9 C. & P. 353), Alderson, B., asked the jury

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whether the prosecutor *meant* that the prisoner should leave the jugs with the lady, and either bring back the money or make a bargain. In *Reg. v. Johnson* (5 Cox C. C. 372), the jury found, under direction, that the prosecutor *did not intend* to part with the property in the cheque. In *Parke's case* (2 East, P. C. 671) the question left was, whether there was a sale by Mr. Wilson, and a delivery of the goods with intent to pass the property. The jury found that Mr. Wilson did not intend to give credit. The conviction was indeed set aside, but on the ground, as I apprehend, that there was no evidence to justify the finding of the jury. In *Rex v. Nicholson* (2 East, P. C. p. 669), the conviction was held to be wrong by the Judges, on a case reserved, on the ground that the property in the post bills and cash was parted with by the prosecutor *under the idea that it had been fairly won*. The ground of the judgment seems to me to be the *intention* or *idea* of the prosecutor. In the case of *R. v. Adams*, it seems to me impossible to say that any property in the hat passed to the prisoner in consideration of law. The hat was delivered by the owner to an innocent messenger of the prisoner upon an assertion that he, the messenger, was sent by Paul. No property passed to Paul, because there was no delivery to him or to an agent of his. No property passed in law to the prisoner, because there was no intention that he should have the hat. But the act of taking relied on was the delivery of the hat by the prosecutor to the messenger, and the prosecutor *intended to part with the property* in the hat, or, in other words, that it should be taken away and *kept*. The Judges, on a case reserved, held that there could be no felony. The decision in the cases of *Rex v. Davenport* and *Rex v. Savage* seem to me to be founded entirely on discussions and considerations as to the *intention of the prosecutor* to pass the property. In *Atkinson's case* (2 East, P. C. 673), the decision of the Judges upon a case reserved is, in terms, that there was no felony, as it appeared that the property was intended to pass by the delivery of the owner. In the last case upon this point, the case of *R. v. Prince* (11 Cox C. C. 193), the proposition of law is thus stated by Blackburn, J.: "If the owner *intended* the property to pass, though he would not so have *intended* had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with the masters, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant *intends* to part with the property in it." The question has always been a question left to the jury, and has never hitherto been treated as a difficult question of the law of property to be ruled by the Judge. There is no trace in the books of the treatment now sought to be applied. The preamble to the statute 33 Hen. 8, c. 1, draws the distinction between goods taken "by stealth" and goods "delivered by the owner willingly, on being deceived by false tokens." On consideration, then, of the authorities, and

of the part of the definitions with which they dealt, and of principle, I am of opinion that the proposition of law which would have been applicable in this case if the owner himself had been present is, when accurately stated, that "where there is a delivery of the goods by the owner, there can be no felony *if the owner intend to part with the property* in the goods, however fraudulent the means by which such delivery was procured." Where the delivery is made by a servant or agent of the owner, and the servant or agent have an authority to pass the possession of and the property in the goods as if the owner were present, the same rule is applicable as if the delivery had been made by the master (*R. v. Jackson*, and *Reg. v. Prince*). But if the delivery be by a servant or agent whose authority is limited, intending only to pass the possession and not to pass the property, then the proposition applicable is that which applies when the master delivers only the possession, and not the property. Although the servant delivers the goods, intending to pass both possession and property, the prisoner may be convicted of larceny, if he obtained the delivery by fraud (*R. v. Longstreeth*, 1 Moo. C. C. 137, and many other cases); just as if by fraud he obtained delivery from the owner who intended by such delivery to give possession only, and not to pass the property. Such I believe to be the propositions of law which have been acted upon by a long series of most able and careful Judges, and which therefore the present Judges, in my opinion, have no authority to overrule. It follows that I cannot agree with a judgment which decides that, even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster-General if he had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted. I think that such a judgment is founded upon and enunciates a wrong proposition of law. Upon the assumptions of fact thus stated, I am of opinion that a prisoner could not be convicted according to law of larceny. But if the clerk had only a limited special authority to part with only the possession of the money entrusted to him, or a limited special authority to part with the property in a different sum from that which he delivered to the prisoner, or a limited special authority to part with a similar sum to that which he delivered to the prisoner, not to the prisoner but to another person, then I am of opinion that the prisoner, upon the assumption that the other parts of the definition of larceny were proved, was properly convicted of taking the money without the consent of the Postmaster-General, and properly convicted of larceny. This reduces the difference of opinion as to the first proposition which has been stated in this case to a difference of opinion as to what was the intention of the clerk with regard to delivering the money; and, for the second proposition as to what was the authority in fact of the clerk. It seems to me that, with regard to passing the possession of and property in the money entrusted to him, he had the

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same authority as any other bank clerk. If he acted with strict accuracy, his duty was to part with so much money as he was directed to part with by a genuine warrant, and to pay such sum of money to the person mentioned in such warrant. But he had authority to part, not with any specific money, but with any of the money entrusted to him, to any one of all the persons who should properly present a genuine warrant. That seems to me to be a general authority. To all such persons he had authority to give possession of the money, in order that they might keep it; that is to say, he had authority to pass to all such persons the possession of and property in the money which he handed to them. It seems to me therefore that as to passing the possession of and property in the money which he should deliver, he had a general authority to deal with the money as if in place of the owner. It seems to me that the clerk intended to pass to the man who stood before him, that is to say, the prisoner, the possession of and the property in the whole of the money which he laid on the counter for the prisoner to take up, and entered into the prisoner's book as paid to the prisoner; and it seems to me to follow that the prisoner, notwithstanding his fraudulent knowledge of the clerk's mistake, and his fraudulent reticence, and his fraudulent acceptance of what he knew was not due to him, cannot legally be convicted of larceny. I think that the conviction was wrong.

CLEASBY, B.—The case is not affected by the Acts of Parliament extending the criminal responsibility for larceny to bailees and others, because the prisoner was clearly not a bailee so as to be guilty by subsequently converting the money to his own use, and he does not come within any other Act of Parliament. We have, therefore, to deal with a case in which a crime is charged which under the old law would have been punishable with death, and in early times generally received that punishment. The punishment was so severe that the crime was strictly defined, and from the earliest times was not committed by fraudulently dealing with or appropriating the property of others, but was only committed when the property was taken by the accused; and it must be taken fraudulently without the consent of the owner. It is laid down in Foster's Crown Law, p. 123, "It is of the essence of the offence of robbery and larceny that the goods be taken against the will of the owner." Lord Coke, in the 3rd Institute, under the head of larceny or theft, p. 107, quotes the definition in the Mirror of Justice to the above effect, and he then gives the explanation of the words in the Mirror as follows, quoting from the translation, "It is said a taking for bailing or delivery is not in this case." And Lord Coke himself says afterwards, p. 107, "Secondly, it must be an actual taking; by taking and not bailment or delivery, for that is a receipt and not a taking; and therewith agreeth Glanvil, "*Furtum non est ubi initium habet detentionis per dominium rei.*" This continues the law except so far as altered by statute. But the taking does not necessarily mean a taking by force or surreptitiously; and the cases as to

what constitutes a taking occupy nearly 100 pages in Russell on Crimes, vol. ii, p. 152, 4th edit. They seem to establish; first, that where delivery is fraudulently obtained from any person having no authority to deal with the property, it is a taking from the owner. The instances of this are obtaining delivery from a mere servant by a false representation of the master's orders; obtaining delivery from a carrier whose only authority is to change the possession from A to B by a false representation of being B. Another instance more like the present because there is a mistake is where a person leaves his umbrella or cloak with any person, to be returned on application, and he afterwards fraudulently identifies as his own a more valuable umbrella or cloak belonging to another person. This would be a taking, because the parties had no transaction or dealing connected with property, the person in charge having only an authority to return to each person his chattel. Secondly, the cases establish that when the owner himself delivers them, but only for the purpose of some office or custody, as of a man delivering sheep to his shepherd (an instance put by Coke) if the shepherd had them in his charge and fraudulently converted them to his own use it would be a taking, because the right of possession (much less of property) was not for an instant changed. But the cases also establish that where there is a complete dealing or transaction between the parties, for the purpose of passing the property, and so the possession is parted with, there is no taking, and the case is out of the category of larceny. Considering what the penalty was, there was nothing unreasonable or contrary to the spirit of our laws in drawing a dividing line, and holding that whenever the owner of property is a party to such a transaction as I have mentioned, such serious consequences were not to depend upon the conclusion which might be arrived at as to the precise terms of the transaction, which might be complicated and uncertain and difficult to ascertain. And this agrees with Hawkins's opinion (Pleas of the Crown, Book 1, c. 33, sect. 3) where (in dealing with the question of what shall be a felonious taking), after pointing out that unless there has been a trespass in taking goods there can be no felony in carrying them away, he adds, "And herein our law differs from the civil, which having no capital punishment for bare thefts, deals with offences of this kind (that is fraudulent appropriation of things not taken) as in strict justice most certainly it may; but our law, which punishes all theft with death if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them as civil than criminal offences." I believe the rule is as I have stated, and that it is not limited to cases in which the property in the chattel actually passes by virtue of the transaction. I have not seen that limitation put upon it in any text book on the criminal law, and there are, unless I am mistaken, many authorities against it. The cases show no doubt beyond question that where the transaction is of such a nature that

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the property in the chattel actually passes (though subject to be resumed by reason of fraud or trick) there is no taking and therefore no larceny. But they do not show the converse, viz., that when the property does not pass there is no larceny. On the contrary, they appear to me to show that where there is an intention to part with the property along with the possession, though the fraud is of such a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to transfer the property governs the case than expressly decide it. For how can there be a taking against the will of the owner when the owner hands over the possession, intending by doing so to part with the entire property? As far as my own experience goes, many of the cases of false pretences which I have tried have been cases in which the prisoner has obtained goods from a tradesman upon the false pretence that he came with the order from a customer. In these cases no property passes either to the customer or to the prisoner, and I never heard such a case put forward as a case of larceny. And the authorities are distinct upon cases reserved for the Judges that in such cases there is no larceny. In *Reg. v Adams* (1 Den. C. C. 38), the prisoner was indicted for stealing a quantity of bacon and hams, and it appeared that he went to the shop of one Aston, and said he came from Mr. Parker for some hams and bacon, and produced the following note, purporting to be signed by Parker: "Have the goodness to give the bearer ten good thick sides of bacon and four good hams at the lowest price. I shall be in town on Thursday next, and will come and pay you. Yours respectfully, T. PARKER." Aston, believing the note to be the genuine note of Parker (who occasionally dealt with him), delivered the articles to Adams. The jury convicted, but upon a case reserved, upon the question whether the offence was larceny, the Judges were all of opinion that the conviction was wrong. *Coleman's case* (2 East, P. C. c. 16, s. 104, p. 672) is to the same effect. In that case the prisoner got some silver as change, falsely pretending to come from a neighbour for it; and it was held not to be a case of larceny. *Atkinson's case* was a similar one, and the prisoner was convicted; but on a reference to the Judges after conviction all present held that it was no felony, on the ground that the property was intended to pass by the delivery of the owner (2 East, c. 16, s. 104, p. 673). There is also a large class of cases in which it has been held that there was no taking so as to constitute larceny where the possession had been wholly parted with (not by way of mere charge or custody, as in the case of the shepherd or butler), though there was no intention to pass the property. And the distinction has been drawn between delivering yarn to a weaver to work up on the employer's premises, in which there is no complete parting with the possession, and the delivery to a weaver to take home and work up there. In the latter case the possession is wholly parted with, and previous to

recent legislation there could be no larceny by subsequent appropriation (2 East, P.C. c. 16, sec. 109); so the giving cloth to a tailor to make into a coat. In like manner delivering a horse to be agisted at so much a week (*R. v. Smith*, R. & M. C. C. R. 473), or cattle to a drover, to be sold on the road, if he could do so (*R. v. Goodbody*, 8 C. & P. 665). In all these cases, the legal possession being wholly transferred, there could be no taking in the nature of a trespass, and they were not formerly cases of larceny. I will only further refer to the case of *R. v. Burnes* (5 Cox C. C. 112), and I do so from its resemblance to the present case. The prisoner was indicted for larceny. He was clerk to the prosecutors, and it was his duty to pay dock and town dues. He fraudulently represented that a sum of 3*l.* 10*s.* 4*d.* was required to make the payments, when only 1*l.* 3*s.* was wanted, and obtained the larger sum, intending to appropriate the difference to his own use. Upon a case reserved it was held not to be larceny. The main difference between that case and the present is, that the prisoner there dishonestly made use of falsehood to obtain the larger amount; in the present case he obtained the larger amount by dishonestly omitting to correct the mistake of the Postmistress. In both cases the over-payment was made under a mistake of the facts. In my opinion, all the authorities warrant the proposition of law as laid down by my brother Blackburn, in the last reported case on the subject (*Reg. v. Prince*, 11 Cox C. C. 193), which was like the present, a case of payment under a mistake of fact. "If the owner intended the property to pass, though he would not have so intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with the master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it." With these authorities before me, I cannot accept as the proper test, not the intention of the owner to deliver over the property (which is a question of fact), but the effect of the transaction in passing the property, which might raise in many cases a question of law. This appears to be a novelty, at variance with the definition of larceny, which makes the mind and intent of the owner the test, and irreconcilable with the manner in which these cases have always been dealt with. And it is of great importance to abide by cases already decided by the Judges, because the law of larceny being the same in Ireland as in England, the decisions ought to be the same; and the Judges in Ireland may feel themselves bound by adjudged cases (recognised in all the text-books, and long acted upon), though we may assume to overrule them, and so there may be an undesirable divergence of opinion. And it must be borne in mind that the cases which must be overruled, if this new test be adopted (*Adams's case*, *Coleman's case*, *Atkinson's case*), are not decisions of the Court for Crown Cases Reserved, but unanimous decisions of all the Judges upon cases submitted to

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them. However desirable it may be that the law should now be changed, I am not at liberty to set aside or qualify the rule of law so long settled, and to say that an acquisition of a chattel by dishonest means is now a felony. Nor do I feel myself at liberty to leave such a question to the jury. If the transaction is of the nature which I have mentioned, the dishonest mind of the person receiving is immaterial upon the charge of felony, and ought not, therefore, to be left to the jury, otherwise the jury would be misled by their disapproval of anything dishonest into the erroneous conclusion of a felonious intent to do that which is not a felony. But the person with whom the transaction takes place, and from whom the delivery is received, must be a person qualified to enter into the transaction and capable of passing the property. In the present case the transaction was with the clerk of the postmistress. The clerk was the person placed in the office for the purpose (*inter alia*) of making payments and taking receipts. He is called the clerk, and, therefore, his act within the general scope of his authority would be the act of the postmistress. But it is suggested that the postmistress was not in any sense the agent of the Postmaster-General, but had in each case a separate and particular authority to make the payment. And, upon looking into the Act of Parliament 24 & 25 Vict. c. 14, I should not be prepared to decide this case upon the ground that the postmistress had a general authority, or more than a particular one, to make the payment of ten shillings to the prisoner. And if at the time when the payment was made the postmistress or clerk had done some act wholly out of the authority, as, for instance, payment to a stranger, I should feel a difficulty in saying it must be regarded as the act of a person capable of passing the property in such a transaction. But upon this it is not necessary to give a decided opinion, because the prisoner was the person to be paid the ten shillings for which he applied under the order, and the authority was to pay to him that sum. The exercise of power in making too large a payment on behalf of the Postmaster-General was therefore only excessive, and according to the ordinary rule in the exercise of powers, was valid so far as it was within the power, the excess being clearly separable. This is not the case of the postmistress being authorised to deliver one bag of money to one person, and another bag of money to another person. In that case the prisoner knowingly getting the wrong bag would get something to which he had no colour of title. The authority here is to enter into an account with the prisoner by paying him a certain amount, and making a corresponding alteration in the balance, and this is done; the payment is made, and the corresponding alteration in the balance, but there is a mistake in the amount paid, and so in the balance and it becomes really the ordinary case of over-payment by a banker's clerk by mistake. It appears to me quite impossible, with due attention to the facts, to regard the prisoner as a stranger intervening in a transaction between other parties. No other party was present or was named, and the prisoner en-

tered and left the office in the same character, viz., that of payee, though he left it as payee of a larger amount than he was entitled to, and carried with him the book, which was an unanswerable proof that he was payee, and was payee of the larger amount. The prisoner was therefore entitled to be paid the 10s. out of the money handed to him, and that being so, there is a technical objection to the conviction that there are no particular chattels or pieces of money in respect of which the charge of larceny can be sustained. But, independent of this technical objection, the duty of the prisoner, if he had acted as he ought to have done, was to have taken 10s. out of the amount, and to have handed the rest to the clerk. He ought at the same time to have handed back his book, and had it corrected, because it charged him with the receipt of 8*l.* odd; but his omission to do this does not, in my opinion, involve him in the charge of larceny. There was no mistake in the person, because the prisoner handed in his order and also his deposit book, and if the clerk had known him well, it would have made no difference. He would still have paid him the wrong amount, because the same cause would have operated, viz., looking at the wrong order. There was no mistake in the amount—I mean it was not the case of the clerk handing him a hundred pound note when he intended to hand a five pound note, or unknowingly two notes instead of one. He intended paying the prisoner the particular sum; and it was a deliberate act, because he took the amount from a document, and completed the transaction by debiting the prisoner with that sum in his book. So that it was not like the case of a wrong sum being put down by mistake, and the prisoner snatching it up, and running away with it for the purpose of preventing the mistake from being set right. The mistake was in the supposed amount of the prisoner's claim. The prisoner applied for 10s., and the clerk thought he was entitled to more, and paid him accordingly, and this over-payment might have been afterwards adopted by the postmistress, so as to make the prisoner chargeable with the balance. The clerk did not the less intend to make the payment which he deliberately made, because he was at the time under the influence of a mistake. He would not have intended to make the payment but for the mistake. Mistakes are constantly occurring, and few people can say that they have not acted under their influence, but their acts remain as acts done at the time, though their effects may be afterwards corrected. No doubt there was no intention to overpay the prisoner, that is, to produce the effect of overpayment; but the intention was to do the act of paying the larger sum because it was thought to be the proper one. This is the answer to one argument addressed to us, viz., that the prisoner took up what was intended for another and not for him, and therefore there was a taking by him *invito domino*. The conclusion of law would be quite correct if it could be correctly said that the amount was intended for another. The clerk ought to have intended that amount for another, and

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would have done so if he had properly informed himself of the facts, but unfortunately for the prisoner the clerk did not properly inform himself of the facts, and therefore he intended the prisoner to receive the larger amount. The clerk intended A to receive what he ought to have intended B to receive, but it was not the less his intention that A should receive what he handed over to him. There was only one transaction, and only two parties to it, the clerk and the prisoner, and his fault was the work of an instant, and would to an ignorant and illiterate person be connected with some confusion of mind, though the disparity of amount in this case would make a person of any sense correct the mistake. I do not think a man ought to be exposed to a charge of felony upon a transaction of this description, which is altogether founded upon an unexpected blunder of the clerk. The prisoner was undoubtedly at the office for an honest purpose, and finds a larger sum of money than he demanded paid over to him and charged against him. A man may order and pay for certain goods, and by mistake a larger quantity than was paid for may be put in the package, and he may take them away, or he may pay in excess for that which is ordered and delivered. Is the person receiving to be put in the peril of a conviction for felony in all such cases, upon the conclusion which may be arrived at as to whether he knew, or had the means of knowing, and had the *animus furandi*? I think not. I think such cases are out of the area of felony, and therefore the *animus furandi* is inapplicable and ought not to be left to the jury. And any conclusion founded upon the finding of the jury upon a question which ought not to be left to them must be erroneous because the foundation is naught. I think the conviction was against law and ought to be quashed.

Conviction affirmed.

CENTRAL CRIMINAL COURT (OLD COURT).

April Session, 1870.

(Before Mr. Justice LUSH.)

REGINA v. WOODHURST (a).

Carnal knowledge of girl under twelve—Consent extorted.

On an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault.

Held, on the latter count, that, although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect.

Quære, if such consent can be given in such a case by a child who is not sui juris?

THE prisoner was indicted for having, in October 1868, carnal knowledge of a girl above the age of ten years, and under twelve, with her consent. In a second count he was indicted for an assault.

Platt for the prosecution.

Langford for the defence.

The prisoner was a strong powerful man, and the girl was his daughter, a child who, at the time in question, was but just above ten years of age. According to the evidence—confirmed to some extent by other witnesses—he had been in the habit of tampering with her person; and on the last occasion there was some degree of penetration, which gave her pain, and for some reason it did not appear to have been repeated. One of the witnesses—the prisoner's son—one night saw the child in his father's bed, and according to his account what occurred was not resisted or resented, and he reproached her with it. From something long afterwards overheard by a woman with whom the prisoner lived, he was accused of tampering with her, and being taxed with it in her presence—though he denied—she declared he had meddled with her. He thereupon said he had not ruined her, which was represented by his counsel as meaning that he had not completed the crime. The doctor stated that penetration had taken place to

(a) Reported by W. F. FINLASON, Esq., Barrister-at-Law.

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some extent, but as it was so long ago he could not say more.

LUSH, J. (to the Jury).—Upon the first count, which admits the child's consent, you must be satisfied that the act was completed, *i.e.*, that there was some extent of penetration. On the second count, you cannot convict if there has been consent, as an assault excludes consent. But consent means consent of will, and if the child submitted under the influence of terror, or because she felt herself in the power of the man, her father, there was no real consent, and as the acts were indecent and unlawful in their nature, you can convict.

Guilty, one year's imprisonment with hard labour.

Quære, as to this, in the case of a person not *sui juris*, or a child under sixteen, or a wife.—*Chamberlain*.

HOME CIRCUIT.

Hertford, March 3, 1873.

(Before Mr. Justice BRETT.)

THE QUEEN v. PORTER. (a)

Murder—Manslaughter—Resisting lawful apprehension.

If a prisoner, having been lawfully apprehended by a police-constable on a criminal charge, uses violence to the constable, or to anyone lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder : And so, if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter.

THE prisoner was indicted for the murder of Joseph Dowfield, at Abbott's Langley.

W. A. Clark was for the prosecution.

Woollett for the prisoner.

In November last, the prisoner, with another man, named Crawley, had been drinking at a public-house. The barmaid missed money from the till, and, as they were the only men in

the room, suspected them, and sent for her master, the publican. He thereupon charged them on suspicion of stealing the money, and a policeman took them into custody, and handcuffed them together. They were quiet while this was being done, but as they were about to be taken off in the publican's cart, Porter, the prisoner, said he would not go, as the publican should not have four or five shillings for taking him to Hemel Hempstead (where the police-station was), and that he would rather walk. The policeman tried to put him in the cart, but he resisted, and would not go in. The other man, being pulled about in the struggle, and being hurt by the handcuffs, began to be excited, and they both became violent, struggling to get away. The policeman called upon the publican to assist him, and they threw the prisoners on the ground, and kept them down, and sent for a rope to tie them. The policeman, however, sent away the rope, saying that, if the men would go quietly, they should get up. They got up, but said they would not go in the cart, and the policeman then called on the deceased man to aid and assist in taking them away, which he accordingly was about to do. He clapped the men on the shoulders, and told them to go quietly, as it would be a great deal better for them. Porter said angrily to him "What have you to do with it?" Then he or the other man kicked him violently in the abdomen. The man at once fell backwards. The publican, the chief witness on this point, admitted that, at the time when he was before the magistrates, he was not certain which of the men gave the kick, but now he swore it was Porter, and so did the policeman, who also said "he kicked deliberately." Ultimately the men were thrown down, again Porter's legs were tied, and the two men were put into the cart together, and taken off to Hemel Hempstead. It was not supposed at the time that the man had sustained any injury from the kick, but in two or three days he died, and a *post mortem* examination showed mortification of the bowels caused by the kick.

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The defence was that it was uncertain which of the men inflicted the kick, and that as it was inflicted in a scuffle, it was only a case of manslaughter. No point was made as to the putting on of the handcuffs being illegal, (a) and except as showing that it might have irritated the prisoner, it was not relied upon; and it will be observed that the deceased man was no party to it. (b)

BRETT, J. (to the Jury).—The men had been given into custody of a police-constable, who had legal authority to take them into custody and to call upon others to assist him, and they had no right to resist him, and in resisting him they were doing what was illegal. He directed them distinctly that if the prisoner kicked the man, intending to inflict grievous harm, and death ensued from it, he was guilty of murder. He directed them further that if the prisoner inflicted the kick in resistance of his lawful arrest, even although he

(a) *France v. White*, 1 M. & G.

(b) *Et vide post.*

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did not intend to inflict grievous injury, he was equally guilty of murder. But if, in the course of the struggle, he kicked the man, not intending to kick him, then he was only guilty of manslaughter. The questions for the jury, therefore, were whether the prisoner inflicted the kick wilfully, and intending to inflict grievous injury, or intending to resist arrest, or whether it was only accidental in the course of the scuffle. The deceased man was entitled to the same protection as the police-constable himself. If the jury believed the police-constable, the prisoner was clearly guilty of murder, for the policeman swore that he "kicked him deliberately." If he intended to kick the man, it was hardly possible but that he did it intending at all events to resist arrest. The question really came to this—whether the prisoner really intended to kick the man, for it was hardly possible that he could have intended to kick him, unless he had one or other of these criminal intents, and in either case he was guilty of murder. If, however, they thought that the kick was accidental, in the course of a wild struggle, then he would be guilty only of manslaughter.

The jury found the prisoner guilty of manslaughter.

The learned JUDGE, in passing sentence, observed the prisoner had not resisted being handcuffed, but being removed in custody, and that his resistance certainly was illegal. (a)

Sentence was ten years' penal servitude.

(a) The point, therefore, did not arise; what would have been the case if the prisoner submitting quietly to arrest, had resisted being unnecessarily handcuffed or tied, or any other infliction of unnecessary violence or ignominy.

V.C. BACON'S COURT.

*Feb. 15 and 18, and March 1.**Re BATEMAN'S TRUSTS.**Felon's goods—Colonial conviction—Forfeiture—Prerogative of Crown.*

A person entitled to a legacy to be paid to him at twenty-one was, while under that age, convicted of felony in this country, and after attaining that age was again convicted of felony in New South Wales.

Held, that the legacy would have been forfeited by the colonial convictions, had it not been already forfeited by the conviction in England.

THIS was a petition for the transfer to the Crown of certain sums of stock which had been paid into court under the following circumstances :

Thomas Bateman, by his will made in 1814, gave a sum of 3000*l.* Bank Annuities to his wife for life, and after her decease he gave the same to his grandchildren, Arthur and Alfred Bryer, to be transferred to them on their respectively attaining the age of twenty-one years, and he directed the income in the meantime to be applied for or towards their maintenance, with gifts over in default of their respectively attaining the age of twenty-one.

The testator also gave a moiety of his residuary estate to be divided equally between his said grandchildren at the same time and in the same manner as the preceding gift.

The testator died in 1820, and his widow died in 1837.

Alfred Bryer, who was born in 1805, was on the 20th June, 1825, convicted of felony at the Old Bailey, but sentence was not recorded on his relations undertaking to send him out to New South Wales for a term of seven years. While there he was three times convicted of penal offences, and sentenced to certain terms of imprisonment. In 1842 he received a certificate of freedom, since which time he had not been heard of, in consequence of which in 1872, his brother, Arthur Bryer, took out letters of administration to his estate.

The trustees of the will being in doubt as to the effect of the conviction upon the interest of Alfred Bryer under the will, paid the fund to which he was entitled, amounting to about 12,000*l.* Bank annuities, into court, under the Trustee Relief Act.

Re BATEMAN'S TRUSTS. *Hemming*, on behalf of the Crown.—By the conviction of Alfred Bryer at the Old Bailey all his property, whether vested in possession or not, became forfeited to the Crown (*Re Thompson's Trusts*, 22 Beav. 506; 28 L. T. Rep. O. S. 57); but even if it were not so, the subsequent convictions in New South Wales after the fund had come into possession would have worked a forfeiture.

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Felony.

Swanston, Q. C. and *Stirling*, for Arthur Bryer.—The interest which Alfred Bryer took under the will of his grandfather, not being in possession at the time of the conviction at the Old Bailey, was not thereby forfeited: (*Stokes v. Holden*, 1 Keen, 145). The Crown is not entitled to the goods of felons in the colonies. Forfeiture for felony is simply a feudal law, and the forfeiture is not necessarily to the Crown, but to the next lord above the felon, which in this case would be the Colonial Government and not the Crown in England. In some cases corporations are entitled to the felon's goods: (*Staunford on Prerogative*, 45; *Yorke on Forfeiture*, 92.) Colonists carry with them only such of the laws of the mother country as are required by the state of the country to which they go, and it is for the Crown to show that the law of forfeiture has been transplanted into Australia: (*Attorney-General v. Stewart*, 2 Mer. 159 n.) It has been held that the Mortmain Act is not applicable to *Australia* (*Wicker v. Hume*, 7 H. L. C. 124; 31 L. T. Rep. 319), and on the same principle the law of forfeiture cannot be applied. The following authorities were also referred to: 9 Geo. 4, c. 83; 33 & 34 Vict. c. 23; *Story's Conflict of Laws*, c. 16, par. 621; *Blackstone's Commentaries*, 134; *Ogden v. Folliott* (3 Term. Rep. 726, 733); *Emperor of Austria v. Day*, 4 L. T. Rep. N. S. 274, 494; 2 Giff. 628.

Kekewich appeared for the trustees.

Hemming in reply.—Forfeiture for felony is a punishment for the offence, and does not at all relate to the feudal system, but is a prerogative vested in the Crown: (*Blackstone's Commentaries*, vol. 2, p. 252; *Chitty on Prerogative*, 215.) Goods are forfeited on conviction, lands on attainder; and it is immaterial whether the interest be legal or equitable, in possession or action: (*Jarman's Bythewood's Conveyancing*, vol. iv. pp. 70, 74.) The Colonial Government is no more the mesne lord between the Crown and the felon than a minister of the Crown in England is mesne lord between them. It is true that in some places corporations are entitled to forfeitures for felony, but then it is only by grant from the Crown. The Queen's prerogative runs as much in the colonies as in England, and the Crown is therefore entitled to this money.

The VICE-CHANCELLOR said I have no doubt that this money was the property of Alfred Bryer at the time of his conviction at the Old Bailey, and therefore that it is properly forfeited to the Crown. It has been suggested on behalf of the respondent that the right of forfeiture to the Crown by reason of the colonial convictions has

not been established, and that the Queen's prerogative does not extend so far as New South Wales; but the arguments which have been brought forward in support of these propositions have really nothing to do with the question. The Queen is as much the Queen of New South Wales as she is the Queen of England, and I have no hesitation in saying that her prerogative is as valid in the colonies as it is in this country. As to the argument that the mesne lord is entitled to forfeitures for felony, wherever such rights do exist, they are derived only by grant from the Crown. I am, however, of opinion that the legacy was absolutely vested and not contingent at the time of Alfred Bryer's conviction in England; and that, therefore, irrespective of the colonial convictions, it is properly forfeited to the Crown.

Re BATEMAN'S TRUSTS.

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Forfeiture for Felony.

Solicitors for the Crown, *Raven and Bradley.*

Solicitors for the respondent, *F. and E. Chester.*

Solicitors for the trustees, *Freshfields.*

COURT OF CRIMINAL APPEAL.

Saturday, April 26, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, J., ARCHIBALD, J.,
and HONYMAN, J.)

REG. v. CHARLES SATCHWELL. (a)

Arson—Stack of Straw—24 & 25 Vict. c. 97, s. 17.

The prisoner set fire to a quantity of straw placed in a lorry and left for the night in the yard of an inn on its way to market:

Held, that upon these facts a conviction on an indictment, charging him with setting fire to a stack of straw, could not be sustained.

CASE stated for the opinion of this Court by Blackburn, J.—

At the last Summer Assizes for Warwick, the prisoner was tried before me for wilfully and maliciously setting fire to a stack of straw, the goods of William Allsop.

There was a second count for a previous conviction.

It was proved that the prisoner did wilfully and maliciously set

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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fire to a quantity of straw, amounting to 22 cwt., which was packed on a lorry.

The straw had been placed on the lorry to convey to market, and brought six or seven miles on the way. The horses had been removed, and the lorry with the straw on it left for the night in the yard of an inn, ready to be taken on to market next morning.

I inclined to think that the straw, being packed on a lorry, was not a stack within the meaning of the 24 & 25 Vict. c. 97, s. 17, and consequently, that the setting fire to it was not a felony; but the case being clear in fact, I directed a verdict of guilty, and sentenced the prisoner to seven years' penal servitude, reserving the point, whether the setting fire to the straw was a felony.

(Signed)

COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C.J.—We have considered this case, and are all of opinion that this conviction must be quashed. The prisoner was indicted under the 24 & 25 Vict. c. 97, s. 17, for setting fire to a stack of straw, and the question reserved is, whether the facts proved support an indictment for setting fire to a stack of straw. The statute enacts that whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony. That section refers specifically to certain things, the setting fire to which shall be felony. Now here, what the prisoner set fire to was not a stack in the ordinary sense of the word, but a quantity of straw on a lorry. The case does not state whether that straw was brought from a stack or was to be taken to a stack. We think that this was not a stack of straw when set fire to, though it may have been once part of one; and that having, if it ever was a stack, been removed and placed on a lorry ready to be conveyed to market, it had ceased to be a stack. The case of *Reg. v. Aris* (6 Car. & P. 348) was somewhat similar to the present, and so far as it goes confirms our opinion. In that case, one count of the indictment charged the prisoner with setting fire to a stack of wood, and the evidence was that at the time of the fire there were in a loft some straw and a score of faggots, which were piled up one upon another. The straw was burnt and some of the faggots, and Park, J., held, that this was not a stack of wood within the statute of 7 & 8 Geo. 4, c. 30, s. 17.

The rest of the Court concurred.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

Saturday, May 3, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, J., ARCHIBALD, J.
and HONYMAN, J.)

REG. v. LINCE. (a)

False pretences—Divisibility—Evidence.

The prisoner was convicted on an indictment charging that he did falsely pretend that he then lived at, and was the landlord of, a beerhouse, and thereby obtained goods.

The evidence was, that prisoner said he was the nephew of a man in prosecutor's employ, which was true; and that he lived at the beerhouse; but he did not say he was the landlord of that house. Prosecutor, in parting with his goods, was influenced both by the fact of his being the nephew of his servant, and the statement that he lived at the beerhouse; he believed him to be the landlord of the beerhouse:

Held, that it was immaterial that the prosecutor was partly influenced by the fact that the prisoner was the nephew of his servant:

Held, also, that the allegation that the prisoner lived at and was the landlord of the beerhouse was divisible, and that the part, "that he lived at the beerhouse," being false, he was rightly convicted.

CASE reserved for the opinion of this Court.

The prisoner was indicted at the adjourned Epiphany Sessions, held at Chelmsford, on the 18th of February, 1873, for that he did unlawfully, knowingly, and designedly, falsely pretend to one James Hutley, that he, the said William Lince, then lived at and was then the landlord of a certain beerhouse at Margaretting Tye, by means of which said false pretences that the said William Lince did then and there unlawfully obtain from the said James Hutley eighty-six bushels of potatoes, with intent to defraud.

From the evidence it appeared that the prisoner was the owner of a van in which he lived, and which at the time in question was standing in a field in the occupation of the keeper of the beerhouse on Margaretting Tye. Prisoner had never resided in this

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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beerhouse, but it was with the consent of the keeper of the said beerhouse that the van was standing in the field; and there had been money transactions between prisoner and the beerhouse keeper.

The prosecutor, James Hutley, stated that when the prisoner came to him to purchase the potatoes which were the subject of the charge, and which were sent to the prisoner and never paid for, he, the prisoner, told him he was the nephew of a man then in prosecutor's employ, and this turned out to be true; and he further told him that he lived at the beerhouse at Margaretting Tye, though he did not say he was the landlord of that house.

The prosecutor stated that when he sent the potatoes to the prisoner his mind was influenced by the belief that the prisoner was his servant's nephew, and that his mind was also influenced by the statement that he lived at the beerhouse at Margaretting Tye. The prisoner did not say he was the landlord of the beerhouse, but still he believed him to be the occupier of that house.

It was contended for the defence: First, that there is only one pretence stated in the indictment, namely, that prisoner lived at and was then the landlord of the beerhouse, that this assertion could not be divided, and that inasmuch as the evidence showed that the prisoner had not represented himself as the landlord, the prosecution must fail; secondly, assuming that the assertion is divisible, and that the words, "he lived at," are a pretence, there is no evidence to show that the property was obtained by means of that pretence, the prosecutor saying that the belief that the prisoner was the nephew of his servant influenced his mind as well as the belief that he was the occupier of the beerhouse.

The Chairman directed the jury to find the prisoner guilty if they believed, first, that any false representation had been made; secondly, that the mind of the prosecutor had been influenced in a substantial degree to part with his property by that false pretence; thirdly, that there was fraudulent intent upon the part of the prisoner in the transaction. But that if they had reasonable doubts upon any one of these points, they were to acquit him.

The jury found the prisoner guilty, and the following points were thereupon reserved:—First, whether the charge could be sustained, the indictment stating the false pretence to be, that the prisoner "then lived and was the landlord of a certain beerhouse," when the prisoner had never stated that he was the landlord of the beerhouse, but only that he lived there; secondly, whether a charge of obtaining goods by false pretences can be sustained when prosecutor admits that another circumstance influenced his mind in parting with his goods, as well as the alleged false pretence,

The prisoner was sentenced to six calendar months hard labour and being unable to find bail, he went to prison.

(Signed)

J. W. PERRY WATLINGTON,
Chairman of the Essex Sessions.

No counsel appeared to argue for the prisoner.

G. Tayler, for the prosecution.—First, it is not necessary that all the false pretences alleged should be proved, but if part only be proved, and the prosecutor was induced thereby to part with his property, that is sufficient. [BLACKBURN, J.—What is the false pretence proved here? The prisoner never said that he occupied the beerhouse, and the prosecutor only states that his mind was influenced by the statement that he lived at the beerhouse. It is not found that the prisoner led him to believe that he was the landlord of the beerhouse.] The case does not profess to set out the whole of the evidence, and it was for the jury to determine whether the prisoner's statement could reasonably influence the prosecutor's mind. [BLACKBURN, J.—The case does not show that the jury were ever asked to determine that.] This is a case of variance merely, and the false pretence charged, that the prisoner lived at and was the landlord of a certain beerhouse, is divisible. In *Reg. v. Hewgill* (Dears. 315), it was held sufficient to set out in the indictment the actual substantial false pretence by which the property was obtained, and to prove the same, although other matters not alleged in some measure operated as an inducement upon the prosecutor's mind. Here it was proved that the prisoner said he lived at the beerhouse, and the jury have found that it operated on the prosecutor's mind.

BOVILL, C.J.—There were two points contended for by the prisoner's counsel at the trial, and reserved for the consideration of this court. The first point was, whether the charge could be sustained, the indictment stating the false pretence to be, that "the prisoner then lived at and was then the landlord of a certain beerhouse," when the prisoner had never stated that he was the landlord of the beerhouse, but only that he lived there. It is clearly sufficient to sustain an indictment to prove part only of the false pretences charged; and the question here is whether the false pretence charged, viz., that the prisoner "then lived at and was the landlord of a certain beerhouse," is a statement of two facts which are false. It seems to me that it is, and that they may be divided; and that if it is proved to be false as to one, the other need not be proved. The second point reserved was, whether a charge of obtaining goods by false pretences can be sustained when the prosecutor admits that another circumstance influenced his mind in parting with his goods, as well as the alleged false pretence. It has been long settled that it is immaterial that the prosecutor was influenced by other circumstances than the false pretence charged. If that were not so, an indictment for false pretences could scarcely ever be maintained, as a tradesman is generally more or less influenced by the profit he expects to make upon the transaction. The case of *Reg. v. Hewgill* is an authority in support of this view. I therefore think this conviction ought to be affirmed.

BLACKBURN, J.—The only doubt that I have had is, whether on the case it appears that the jury were sufficiently asked to find

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whether the prisoner's statement that he lived in the beerhouse and whether it is sufficiently found that that false statement influenced the prosecutor's mind. I think, however, that that point is not reserved.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

Tuesday, April 29, 1873.

(Before COCKBURN, C.J., MELLOR AND LUSH, JJ.)

REG. v. CASTRO.

*Trial at bar—Removal by certiorari from Central Criminal Court—
Indictment for perjury—Offences in two counties.*

An indictment, containing two counts, one alleging perjury committed in Middlesex, the other alleging perjury committed in London, was tried, upon removal by certiorari from the Central Criminal Court, before the Queen's Bench sitting at bar.

Held, that it was no valid objection to the jurisdiction of the court that the jury was entirely from the county of Middlesex.

INDICTMENT for perjury, removed from the Central Criminal Court by *certiorari* and tried at bar by application of the Attorney-General. The jury summoned by the court consist of special jurors of the county of Middlesex.

The indictment contained two counts: the first alleged that the defendant committed perjury in the trial at Nisi Prius at Westminster of the ejectment *Tichborne v. Lushington*; the second alleged that the defendant committed perjury in affidavits in the Chancery suit of the same name, sworn by him in the city of London before a commissioner for taking oaths in Chancery. The *venue* laid in the indictment was "Central Criminal Court."

The *certiorari*, in pursuance of 9 & 10 Vict. c. 24, s. 3, stated the county of Middlesex to be that in which the indictment was to be tried. That section is:—

3. And whereas doubts have been raised as to the proper place of trial, where indictments have been removed by writ of *certiorari* from the Central Criminal Court into the Court of Queen's Bench: Be it enacted, that every writ of *certiorari* for removing an indictment from the said Central Criminal Court, shall specify the

county or jurisdiction in which the same shall be tried; and a jury shall be summoned, and the trial proceed in the same manner in all respects, as if the indictment had been originally preferred in that county or jurisdiction.

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Kenealy, Q.C. and *McMahon* for defendant, contended that the court with a Middlesex jury had no jurisdiction to try this indictment. The general common law rule, to which perjury is no exception, requires that a criminal shall be tried in the county, and by a jury of the county, in which the crime has been committed. That rule is not affected by the provision in 9 & 10 Vict. c. 24, s. 3, concerning indictments removed by writ of *certiorari*. *Corner's Crown Practice* (p. 259), says, "As the trial [at bar] must be by a jury of the county wherein the offence was committed (unless otherwise ordered by the court upon suggestion), it has been thought that a trial at bar cannot be had in a cause originating in London, or in a county palatine, the jurors being exempted by charter from coming out of their city or county to try any issue, unless the jurors consent to waive their privilege; but the more convenient mode would be to move for a suggestion for trial by a jury of an adjoining county, and, that being granted, to move for a trial at bar." In this case no motion had been made for trial by a jury of an adjoining county, nor indeed would that be of any avail, for part of the perjury alleged in the indictment was committed in Middlesex, and part in London. [COCKBURN, C.J.—Surely, if necessary, we can quash the second count of the indictment, and try on the first.] The whole indictment is bad in consequence of the joinder of the two counts. [LUSH, J.—When this court tries a case with a jury, it must be a jury of Middlesex.] That is not what is laid down by *Corner*.

COCKBURN, C.J.—We are all of opinion that there is nothing at all in the point taken on behalf of the defendant by way of objection to the jury. Such as it is, however, it appears on the record, and if required may be raised hereafter.

COURT OF CRIMINAL APPEAL.

Saturday, April 26, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, J., ARCHIBALD, J.,
and HONYMAN, J.)

REG. v. A. H. MORTON. (a)

Forgery—Deed—Clergy—Letters of orders—24 & 25 Vict. c. 98, s. 20.

The forging of letters of orders issued by a bishop, certifying that on a day and at a place mentioned therein, A. B. was admitted into the holy order of deacons, according to the manner prescribed by the Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not the feloniously forging of a deed within the 24 & 25 Vict. c. 98, s. 20, although such forgery is a misdemeanor at common law.

CASE reserved for the opinion of this Court by Bramwell, B., at the Worcester Winter Assizes, 1872.

The prisoner was tried and found guilty upon the following indictment:—

The jurors of our lady the Queen, upon their oath present that Thomas Keatinge, otherwise Arthur Henry Morton, on the 14th Aug. 1865, feloniously did forge *a certain deed*, purporting to be under the hand and seal of Lord Auckland, Bishop of Bath and Wells, which said forged deed was and is as follows [it was then set out *verbatim*], with intent thereby to defraud, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Keatinge, otherwise Arthur Henry Morton, afterwards, to wit, on the day and year aforesaid, feloniously did forge *a certain other deed*, purporting to be letters of orders under the hand and seal of Lord Auckland, Bishop of Bath and Wells, with intent thereby then to defraud against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Keatinge, otherwise called Arthur Henry Morton, afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off *a certain other forged deed*, purporting to be under the hand and

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

seal of Lord Auckland, Bishop of Bath and Wells, which said forged deed was and is as follows [it was then set out *verbatim*], with the intent thereby then to defraud, he the said Thomas Keatinge, otherwise called Arthur Henry Morton, at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged deed as aforesaid, well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

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Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Keatinge, otherwise called Arthur Henry Morton, afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off, *a certain other forged deed*, purporting to be letters of orders under the hand and seal of Lord Auckland, Bishop of Bath and Wells, with intent thereby then to defraud, he the said Thomas Keatinge, otherwise called Arthur Henry Morton, at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged deed as aforesaid, well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The document which the prisoner had forged, when produced, was as follows:—

At the request of the Lord Bishop of Melbourne.
By the tenure of these presents, we Auckland, by Divine permission Bishop of Bath and Wells, do make it known unto all men, that on Sunday, the twenty-third day of December, in the year of our Lord one thousand eight hundred and sixty-three, we, the Bishop before mentioned, solemnly administering holy orders under the protection of the Almighty in our cathedral church of St. Andrew, in Wells, did admit our beloved in Christ, *Arthur Henry Morton, a Master of Arts* (of whose virtuous and pious life and conversation, and competent learning and knowledge in the Holy Scriptures we were well assured), into the holy order of deacons, according to the manner and form prescribed and used by the Church of England, and him the said *Arthur Henry Morton* did then and there rightly and canonically ordain deacon; he having first in our presence freely and voluntarily subscribed to the Thirty-nine Articles of Religion, and to the three articles contained in the thirty-sixth canon, and he likewise having taken the oaths appointed by law to be taken for and instead of the oath of supremacy. In testimony whereof we have caused our episcopal seal to be hereunto affixed, the day and year above written, and in the seventh year of our translation.

Seal of
The Bishop of
Bath and Wells.

AUCKLAND,

—
The Seal of Baron
Auckland,
D.D.

BATH AND WELLS.

The signature and the seal were the genuine signature and episcopal seal of Lord Auckland, Bishop of Bath and Wells, and the document was duly signed, sealed, and given out by him.

But when so given out, the name in it of the person ordained was Joseph Leycester Lyne, the year was 1860, and not 1863; and in the margin the letters dimissory were stated to be from the Bishop of Exeter, not Melbourne.

The forgery consisted in altering the name, adding a "Master

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of Arts," altering the year, and changing "Exeter" to "Melbourne." The alterations are in italics. It was proved that Lyne was ordained by imposition of hands, according to the service in the Prayer Book, and that this document had been delivered to him and afterwards stolen or taken from him without his consent. It was also proved that no other deed or document ordaining, or certifying the ordination, is ever made or given, though the fact of ordination is recorded in a book kept for that purpose. Doubting whether the document was a deed within the meaning of the statute, I now ask the opinion of the Court for the consideration of Crown Cases Reserved thereon.

It will be observed that the document is correctly set forth in the first and third counts. It is, however, there called a deed. (See 1 Lev., 138 ; 2 Russell C. & M., 767 ; and stat. 24 & 25 Vict. c. 98, s. 20.) (Signed) G. BRAMWELL.

W. Goodman, for the prisoner.—The prisoner has been convicted on an indictment which charged him with feloniously forging and uttering a deed, knowing the same to be forged, against the form of the statute 24 & 25 Vict. c. 98, s. 20, which enacts that "Who-soever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed or any bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony." No doubt the prisoner was guilty of the offence of forgery at common law, which is a misdemeanour, but the question here is whether the forging of these "letters of orders," as the document is technically termed, is a felonious forging of a deed within the above enactment. In 2 Russell on Crimes (4th edit., p. 767), it is said : "It is clearly agreed that at common law the counterfeiting of a matter of record is forgery ; for since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. Also it is agreed to be a forgery to counterfeit any authentic matter of a public nature, as a privy seal, or a licence from the Barons of the Exchequer to compound a debt, or a certificate of holy orders, or a protection from a parliament man. It is also unquestionable that a man may be in like manner guilty of forgery at common law by forging a deed ; and therefore it seems that one may be equally guilty by forging a will, which cannot be thought to be of less consequence than a deed." It is submitted that the forging of these letters of orders was not a felony under the above statute, as they were not a deed properly so called. The statute is penal, and to be construed strictly. The mere fact that the document was given out with a seal attached does not make it a deed. In *Brown v. Vawser* (4 East, 584) it was held that an

award under seal was not a deed within the Stamp Act, not having been delivered as a deed. So in *Chanter v. Johnson* (14 M. & W. 408) it was held that a licence under seal to use a patented invention did not require to be stamped as a "deed not otherwise charged," under the 55 Geo. 3, c. 189, sched., part 1, tit. "Deed." Parke, B., there said: "The defendants say the instrument is a deed and ought to be stamped as such, but that is not so—it does not purport to be sealed and delivered as a deed; it rather resembles an award or a warrant of a magistrate, which, though under seal, are not deeds." In 1 Co. Inst., 35b, it is said: "A deed, *factum*. This word (deed), in the understanding of the common law, is an instrument written on parchment or paper, whereunto ten things are necessarily incident, viz.; 1, writing; 2, on parchment or paper; 3, a person able to contract; 4, by a sufficient name; 5, a person able to be contracted with; 6, by a sufficient name; 7, a thing to be contracted for; 8, apt words required by law; 9, sealing; 10, delivery." Again, at 172b, Lord Coke says: "*Faitfactum, Anglice* a deed, signifieth in the common law an instrument consisting of three things, viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party." So that at common law it would seem that an instrument to be a deed must pass some interest, and be in the nature of a contract. These letters of orders are only in the nature of a certificate that the person to whom they are given out has been ordained. Ordination is performed by the laying on of the hands of the bishop upon the head of the person to be made a deacon, and the letters of orders are only in the nature of a certificate that he has been ordained; and when the deacon becomes a curate, a license is given to him by the bishop, which is in the nature of a grant, and contains a contract binding both on the curate and the incumbent of the benefice to whom he becomes curate. So in Com. Dig., Fait. A. 1, it is said, "A deed is a writing containing a contract, and signed, sealed, and delivered by the party (Co. Inst. 35b)." [BLACKBURN, J.—By the 33 & 34 Vict. c. 91, a clergyman may execute a deed of relinquishment of his rights, privileges, advantages, and exemptions belonging to his office. That is not a matter of contract. It seems difficult to say that an instrument is not a deed unless it contains a contract.] By a deed of relinquishment the clergyman passes away his interest. Spelman in his Glossary defines a deed thus:—"Factum a forensibus nostris dicitur scriptum solenne, quo firmatur donum, concessio, pactum, contractus." In Shep. Touch., cap. 4, it is said: "A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things contained in the deed. The definitions of a deed, as given in Cruise's Dig., Tomlins' Law Dicty., 2 Black. Com. 497, by Stephens, were also cited. In *Rex v. Fauntleroy* (2 Bing. 413) it was held that the forging of a power of attorney for the transfer of Government Stock was the forging of a deed, but the power contained a

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covenant that the executors and administrators of the donor would confirm the transfer; so that there was a contract contained in it. A deed of feoffment, though not necessary to the transfer of the land, ordinarily contained the words, “dedi, concessi, confirmavi.” This deed does not contain anything upon which an action could be maintained. [BLACKBURN, J.—Does it record or confirm the grant of anything?] The delivery of it is not essential. It is equivalent to a document which certifies that a person has passed some public examination. [BLACKBURN, J.—The 4 Hen. 7, c. 13, enacts, “that a person in orders, at the second time of asking his clergy, shall lose the benefit of his clergy if he do not show his letters of orders.” This seems to show that they are evidence of title in some way.]

Jelf (*Amphlett* with him), for the prosecution.—The words of the 24 & 25 Vict. c. 98, s. 28, “deed, bond, or writing obligatory,” are taken from 11 Geo. 4 & 1 Will. 4, c. 66, s. 10; but in the 5 Eliz. c. 14 (An Act against forgers of false deeds and writings), the preamble uses the words “charters, evidences, deeds, and writings,” and sect. 2 the words, “deed, charter, or writing, sealed court roll, or the will of any person in writing.” This seems to show the nature of the deeds intended, and that the forging of almost any kind of deed was contemplated. The case of *Rex v. Fauntleroy* decided that a power of attorney was a deed. Secondly, as to the nature of letters of orders; they are said to be the legal evidence of admission to the office of a deacon (Blunt’s Law of the Church, p. 201.) [BOVILL, C.J.—No doubt one species of evidence.] The bishop’s clerks or secretaries are not to receive above 6*d.* for any letters of orders; and for the sealing of such letters nothing shall be paid (3 Burn’s Eccles. Law, tit. “Ordination,” sect. b). And by Canon 137: “Every parson, vicar, and curate shall, at the bishop’s first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, to be by him either allowed or (if there be just cause) disallowed and rejected; and being by him so approved, be signed by the registrar.” [BOVILL, C.J.—That is simply directory.] And, further, by Canon 39: “No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders.” [BLACKBURN, J.—In *Marshall v. The Bishop of Exeter* (31 L. J. 262, C.P.) the Court of Exchequer Chamber held that the bishop was acting *ultra vires* in refusing to institute a clerk presented to a benefice because he did not produce letters of good behaviour from the bishop of the diocese in which he previously had a benefice.] Thirdly, as to the definition of a “deed.” The definition of Lord Coke, which has been repeated in so many books, is too narrow. In *Shep. Touch. cap. 4*, after specifying several kinds of deeds, it is said: “There may be and are divers other kinds of deeds besides those which are named before; for every agreement put in writing, sealed and delivered, becometh a deed. And attornments, exchanges, sur-

renders, partitions, authorities, commissions, licenses, revocations, and the like, are usually made, given, done, and granted by deed." Viner's Abr., Fait I., sub-sect. 4; Burrell's Law Dict. (American), tit. "Deed," were then cited. As to a deed of feoffment, which is like the present case, a feoffment was good without deed; and before the art of writing came into use, the delivery of seisin, in the presence of witnesses, was the only evidence of the grant. And when it afterwards became usual to put it into writing, the written instrument, which was called the charter or deed of feoffment, was not considered as conveying any estate or interest in the land, but merely as affording additional testimony of the transfer. In *Rex v. Lyons* (Russ. & Ly. 255), a power of attorney to receive prize money was held to be a deed.

Goodman, in reply.—The ancient deed of feoffment contained a warranty, and an action for breach of the warranty might have been maintained upon it. A deed of relinquishment by a clergyman under the 33 & 34 Vict. c. 91 is analogous to letters of orders, for it is only a deed by statute, not at common law. The statute 5 Eliz. c. 14, makes a distinction between a deed and a writing sealed. The words, "writing sealed" are omitted from the 24 & 25 Vict. c. 98, s. 20. The Probate Act (20 & 21 Vict. 77, s. 28) makes it a felony to forge the signature of any registrar, or any seal of the Court of Probate. The case of *Slater v. Smallbrook* (1 Lev. 138) was cited.

BOVILL, C.J.—The prisoner was indicted for forging a certain deed under the hand and seal of the Bishop of Bath and Wells, which was set out *verbatim* in one count; and in a second count he was indicted for forging a certain deed purporting to be letters of orders; and in other counts he was charged with uttering those documents, well knowing them to be forged. In all the counts the document was described as a deed, so as to bring the case within the 24 & 25 Vict. c. 98, which enacts that whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, "any deed, bond, or writing obligatory, &c., shall be guilty of felony." And the question is, whether the document in this case is a deed within the meaning of that statute? In form this document is usually known as letters of orders issued by a bishop, under his episcopal seal. It is necessary to see what is the real nature and character of the document. Now, the form and manner of ordination of deacons is prescribed and set forth in the Book of Common Prayer; and it appears that a person is admitted to the office of a deacon in the Church of England by the bishop in the face of the Church, and that the ceremony is to be performed either in the cathedral or a parish church, and that on the completion of the ceremony the person becomes a deacon in the Church of England. It is not necessary that there should be any deed, or document, or grant conferring the title to holy orders or to act as a deacon. From very early times it was the practice after the ordination was completed to issue letters of

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orders under the seal of the bishop, and their production was made necessary by the 4 Hen. 7, c. 13, to give a person in orders the benefit of clergy a second time. But letters of orders were not necessary to give a person the *status* of deacon. The letters of orders in this case, which are in the usual form, state that the bishop did, at a specified time and place, admit the person named into the holy order of deacons, according to the manner and form prescribed by the Church of England, and concludes thus:—"In testimony whereof we have caused our episcopal seal to be hereunto affixed." Is that a document within the legal definition of the word "deed?" Generally speaking, a deed, as described in various authorities, is something in the nature of a contract between the parties to it, but it is clearly not confined to cases of contract only. There may be a deed, although no contract is contained in it, as, for example, a deed of feoffment. A deed may effectuate a gift, or grant, or obligation, or a mere authority, as a power of attorney (*Rex v. Lyon* and *Rex v. Fauntleroy*), and there may also be deeds of release and disclaimer. It seems to me that the meaning of the legal definition of a deed, to be gathered from the authorities, is a document under seal and delivered as a deed which confers a right, or passes an interest; or in the case of a feoffment, as a document authenticating the transfer of the land. Does this document purpose to pass or create any interest? It seems to me that it does not. In the first place it does not profess to pass any interest, or create or give any title to anything, but only to certify that a certain ceremony has been performed, and a certain person admitted into the holy order of deacon. It confers nothing and creates no right. It is but a certificate of the ceremony of ordination having been performed according to the rites and ceremonies of the Church of England, and of the person having been duly ordained and admitted to the holy office of deacons. There are many documents under seal which are not deeds, as an award under seal, a licence to use a patent under seal, a will under seal, and a magistrate's warrant; so, again, a certificate of admission under seal, to learned bodies or societies such as the College of Physicians, which has never yet been suggested to be anything more than a certificate authenticating in a solemn manner the admission of a member to that body; so a certificate of proprietorship of joint-stock shares under the seal of the company, which is nothing more than a certificate that the person is the holder of so much stock in the company. A case similar to the present is that of a probate of a will. On proof of a will, in former days, the archbishop or bishop issued a document under the episcopal seal, which certified that the will had been proved, and the fact that administration had been granted to the executors. And the present form of probate of a will is simply a certificate to that effect. Upon the whole, therefore, I am of opinion that letters of orders are not deeds within the 24 & 25 Vict. c. 98, s. 20, and that the conviction cannot be supported.

BLACKBURN, J.—I also think the conviction cannot be supported. It is not the mere putting of a seal on a document that will make it a deed. And I doubt whether letters of orders are deeds within the true definition of the word “deed.” It seems to me that Spelman’s definition, that a deed is a solemn writing, by which a gift, grant, agreement, or contract or something of that sort, is confirmed, comes nearest to the correct definition. I doubt whether the document in this case is a deed within that definition, but I am of opinion that it does not come within the words of the statute 24 & 25 Vict. c. 98, s. 20, “deed, bond, or writing obligatory,” which mean instruments of a similar kind, which pass an interest in a thing. This is a mere certificate of the passing of holy orders, and is not within that Act. At this moment I should be inclined to say that a probate does pass an interest to the person proving the will, but it is not necessary now to decide whether it would be a deed.

The rest of the JUDGES concurred.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

Saturday, April 26, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, J., ARCHIBALD, J.,
and HONYMAN, J.)

REG. v. HOLLIS and BLAKEMAN. (a)

Noxious thing—Administration to procure miscarriage—Evidence of being accessory—24 & 25 Vict. c. 100, s. 58.

A man and woman were jointly indicted for feloniously administering to O. a noxious thing to the jurors unknown with intent to procure miscarriage.

O. being in the family way went to the male prisoner, who said he would give her some stuff to put her right, and gave her a light-coloured medicine, and told her to take two spoonfuls till she became in pain. She did so, and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L., and gave her some more of the stuff, which he said he

(a) Reported by J. E. THOMPSON, Esq., Barrister-at-Law.

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wanted to take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. O. then began to feel pain, and told the female prisoner. Then the male prisoner told her what he had given O. They all went home to the female prisoner's, and the male prisoner then gave O. another bottle of similar stuff in the female prisoner's presence, and told her to take it like the other. She did so, and became very ill, and next day had a miscarriage, the female prisoner attending her and providing all things.

Held, that there was evidence that the stuff administered was a noxious thing within the said Act.

Held, also, that there was evidence of the female prisoner being an accessory before the fact, and a party, therefore, to the administration of the noxious thing.

THE two prisoners, William Hollis and Martha Blakeman, were tried and convicted before me at the Spring Assizes for Staffordshire, 1873, on an indictment charging them under the 24 & 25 Vict. c. 100, s. 58, with feloniously and unlawfully administering to one Sarah Jane Cherrington on the 5th of December, 1872, at Stoke-upon-Trent, in the County of Stafford, a large quantity of a certain noxious thing to the jurors unknown, with intent in so doing to procure the miscarriage of her the said Sarah Jane Cherrington contrary to the statute.

The second count charged the prisoners with feloniously and unlawfully causing to be taken by the said Sarah Jane Cherrington a large quantity of a certain noxious thing to the jurors unknown, with the same intent as in the first count.

The third count charged the prisoners with feloniously and unlawfully causing the said Sarah Jane Cherrington to take and swallow down into her body a large quantity of a certain liquid to the jurors unknown with similar intent.

The material portion of the evidence upon which the prisoners were convicted was as follows:

Sarah Jane Cherrington deposed: In the autumn of last year I was cook at the Castle Hotel, Newcastle-under-Lyme. I found I was in the family way, and left in consequence. On Thursday, the 21st of November, 1872, I went to my brother's at Tunstall. On Saturday, 24th of November, I went to the prisoner Hollis's at Stoke, in the London Road. It is a house, not a shop. The father of the child took me there. I saw Hollis. I told him I was in the family way. He said he would soon put me right; that he would give me some stuff to put me right. I cannot say justly the answer I made. He gave me some stuff, a light-coloured medicine in a phial. I was to take two tablespoonfuls till I became in pain. I told him I was gone about five months. I went back to my brother's with the bottle of medicine. I took one dose—two tablespoonfuls. It had rather a bitter taste. It made me ill all that night and the next day. I destroyed the

bottle. Hollis told me to do so. He told me to be very careful not to be found out. He had promised to come on the Wednesday morning to see me. He did not come then. On Wednesday I went to see him. He was out. I waited for him. He came in. He told me he had been at my brother's, at Tunstall, to see how I was. He said if he had known where I was going to he should not have trusted me with the medicine. He asked me what I had done with the medicine? I told him I had taken one dose. I told him how ill it made me. He asked me what I had done with the bottle. I told him I had pulled out the cork and had thrown the medicine away, and the bottle after. He said I had done right. He said the safest thing would be for him to get me a place to go to. He knew of one at Longton. He wanted a guinea down for him to pay the woman himself. He said it would not be possible for me to have a baby alive after what I had taken. He said I should be able to go back to my situation in a few days. I arranged to go to him that day week. I went the Thursday week (5th of December, 1872) to Stoke to Hollis's house. I said I was come to go to Longton. He said he had expected me yesterday, and he had sent the person word. He asked me if I had the money. I said I had 19s. that was all. I gave it to Hollis. He asked me into the kitchen. He brought me some medicine in a glass. He said he wanted it to take effect against I got there. I took it there—some kind of medicine. I went with him to Longton. At Longton station we met Mrs. Blakeman. Hollis said this is the woman I promised to bring yesterday. She said she had been down at the station several times yesterday. I was taken to some wine vaults. We had something to drink. I began to feel in pain then. I told Mrs. Blakeman I was so, and Hollis told her what he had given me. He said he wanted to get me home quickly. Mrs. Blakeman took me home. She told Hollis he had better walk behind as he was well known in Longton. He followed. We got to Mrs. Blakeman's in Caroline-street. He came in soon after. Hollis gave me in Mrs. Blakeman's presence some medicine in a bottle like the other. The bottle was full. He told me in Mrs. Blakeman's presence to take it like the other. He only stayed about five minutes. As soon as he was gone I took two table spoonfuls again. Mrs. Blakeman was not then present. Between eleven and twelve I felt too ill to keep up any longer. Mrs. Blakeman came up to me. I told her I was very ill. She made the bed afresh, and put blankets underneath—doubled it underneath. I was in great pain all night. Friday morning about eleven I miscarried. She came up afterwards. I told her how ill I was. She asked if it was all over. I said I thought it was. She looked, and dragged the blanket from underneath me. She put it underneath the other bed. I stayed there all day. Hollis came at night between five and six. He came up, Mrs. Blakeman with him. He asked me how I was. I told him I remained very bad. Mrs. Blakeman pulled the blanket from under the

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other bed and showed it to Hollis. He looked at it and said it was a little girl. I saw him put it in his pocket. He told Mrs. Blakeman to throw something behind the fire. Mrs. Blakeman gave me two pills. I staid at Mrs. Blakeman's three weeks ill. After that I went to Mr. Lawton's, Glebe Hotel, Stoke. I was there nine days. The arrangement was made for me by Hollis and Mrs. Blakeman. The latter told me my brother would not receive me, and therefore she had got me a place. This statement was not true. I saw both Hollis and Mrs. Blakeman there. He came first; I saw him at the back door. He came to know how I was going on. I told him I was still very poorly. He told me to keep quiet, not to speak about what had been the matter with me. Mrs. Blakeman also came up into my room; the servant brought her up. She told me I was not to let any of them know what had been the matter. Dr. Ashwell was attending me then. Hollis said I was not to say anything because the doctors were so against him. From Glebe Hotel I went back to Mrs. Blakeman's for six days. I wanted her to write to my brother. She would not. I went with her to Stoke, intending to go to my brother's. When I got to Stoke I had one hour to wait at the railway station. She said she would fetch Hollis to see me. She and Hollis come back. He asked where I was going; I said going to my brother's. He said it was silly; I should let all out.

It was also proved by Ann Cherrington, the sister-in-law of Sarah Jane Cherrington, that the prisoner Hollis called for Sarah Jane Cherrington on Wednesday, the 27th November, while she was out, and that he told the witness to ask her to come to Stoke next day. He said he had got a situation for her in Stoke. The witness asked who he was. He said it did not matter about his name or address. She must come to Stoke.

The witness further proved that Mrs. Blakeman came on Saturday after Sarah Jane Cherrington had left, and said Sarah had sent for her box. This was proved to be false. The witness told her that Sarah Jane Cherrington was pregnant, to which Mrs. Blakeman replied, "No, she is not, for she slept with me last night, and I know better. I will soon give her something to put her right when I get home." Witness asked her where she lived: she said, Wood-street, Hanley. This was false.

It was further proved that Hollis had asked, at the Glebe Hotel, to see Sarah Jane Cherrington, stating she was a relation of his wife's, which was false. And that Mrs. Blakeman had also called several times at the Glebe Hotel, and been up to Sarah Jane Cherrington's room.

It was further proved by a sergeant of police that, when he arrested Hollis and charged him with administering a noxious drug, &c., to Sarah Cherrington, he said, "It's a lie; I never gave her, or anyone else, anything of the sort. I don't even know such a party."

The same policeman proved that, on the 24th of February,

1873, he apprehended Mrs. Blakeman, and charged her with aiding and abetting Hollis in administering a certain drug to one Sarah Cherrington, with intent, &c. She said, "What I am charged with is untrue; she never was ill in my house; she miscarried at Lawton's."

The policeman further proved that, on the 22nd of February he served Mrs. Blakeman with a summons to appear against Hollis. She then said Hollis had never been to her house. The policeman further proved that, on the 27th of February she asked him if she could see the chief superintendent, and that he took her there that night. She then asked him if he would give her the same chance as he did on Saturday, and added, "I wish I told you the truth about it; Hollis did bring the girl to my house, and came to see her."

At the close of the case for the prosecution, it was submitted by the counsel for the prisoners that there was no evidence to go to the jury against either prisoner, as there was no proof that the bottle given by Hollis to Sarah Jane Cherrington contained any poison or other noxious thing, and further, that there was no evidence to fix the female prisoner.

I declined to stop the case but promised, if necessary, to reserve for the consideration of the Court the question whether there was any evidence to go to the jury against both or either of the prisoners.

I left the case to the jury telling them that they could not convict either prisoner, unless they were satisfied that the stuff taken by Sarah Jane Cherrington was a poison or other noxious thing.

The jury found both prisoners guilty, and they were liberated on bail.

The opinion of this Court is requested on the following points, viz.:—First, was there any evidence to go to the jury that the stuff taken by Sarah Jane Cherrington was a poison or other noxious thing; secondly, was there any evidence to go to the jury in support of the charge against the female prisoner.

(Signed)

GEORGE E. HONYMAN.

Bosanquet for the prisoner:—There was no evidence that the stuff administered was a poison or noxious thing within the meaning of the statute 24 & 25 Vict. c. 100, s. 58. The only evidence is that the prisoner Hollis gave the prosecutrix some stuff in a phial of a light colour and of a bitter taste. It was not shown what it was. *Reg. v. Isaacs* (9 Cox. C. C. 228) shows that there must be evidence that the thing administered is noxious. [BRAMWELL, B.—A noxious thing within the statute means a thing that will produce the effect mentioned in the statute—that is, a miscarriage. This appears to have produced that effect. BLACKBURN, J.—There was some evidence that it was noxious]. Secondly, the illness was produced by the first administration of the stuff, and before the prosecutrix was introduced

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to the other prisoner, Blakeman, and there was no evidence that she was a party to that administration. [BOVILL, C. J.—There was evidence of concert. She went to meet the girl at the station, and Hollis told her what he had given the prosecutrix]. There was no evidence that the female prisoner (Blakeman) was a party to the administration of the stuff. [ARCHIBALD, J.—She made all the preparations for the miscarriage.] That would show her to have been an accessory after the fact. [BLACKBURN, J.—The case states, Hollis told the female prisoner what he had given the prosecutrix. When they got to Blakeman's house, Hollis gave the prosecutrix in Blakeman's presence some medicine in a bottle like the other, and told her in Blakeman's presence to take it like the other. She did so, and afterwards felt very ill and was in great pain.] This is not an indictment for a conspiracy to procure a miscarriage, but both are jointly charged with administering a noxious thing with intent to procure a miscarriage. It is submitted that the evidence proves administration by Hollis only.

No council appeared for the prosecution.

BOVILL, C.J.—We are all of opinion that the conviction was right, and ought to be affirmed. The evidence shows that the miscarriage was arranged through the instrumentality of Hollis, who administered the stuff, and some woman who was to procure the means of getting rid of the effects of the thing administered. There was evidence of the two prisoners having acted in concert, and both are answerable for whatever was done in furtherance of the common purpose. They were in communication, and both knew that the drug had been administered. Hollis found the drug, and Blakeman the room where the prosecutrix was taken to, and in a short time the effect intended was produced.

The rest of the Court concurred.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

May 3, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, J., ARCHIBALD, J.,
and HONYMAN, J.)

REG. v. CULLUM. (a)

*Embezzlement—Servant—Receipt of money as such—24 & 25 Vict.
c. 96, s. 68.*

Prisoner was employed by B. to navigate a barge, and was entitled to half the earnings after deducting the expenses. His whole time was to be at S.'s service, and his duty was to account to S. on his return after every voyage.

In October prisoner was sent with a barge load of bricks to L., and was there forbidden by S. to take back manure for P. Notwithstanding this prisoner took the manure and received 4l. for the freight, and appropriated it to his own use. It was not proved that he professed to carry the manure or receive the freight for his master, and the servant who paid the 4l. said that it was for the carriage of the manure, but he did not know for whom it was paid.

Held, that the prisoner could not be convicted of embezzlement, as the money was not received in the name, or for, or on account of his master.

CASE reserved for the opinion of this Court at the Adjourned Quarter Sessions for the county of Kent held on the 7th March, 1873.

Samuel Cullum was indicted as servant to George Smeed for stealing 2l. the property of his master, George Smeed.

The evidence showed that the prisoner was employed by Mr, Smeed, of Sittingbourne, Kent, as captain of one of Mr Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London and to receive back such return cargo, and from such persons as his master should direct.

The prisoner had no authority to select a return cargo, or take any other cargoes but those appointed for him.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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The prisoner was entitled by way of remuneration for his services to half the earnings of the barge after deducting half the sailing expenses Mr. Smeed paid the other half of such expenses.

The prisoner's whole time was in Mr. Smeed's service.

It was the duty of the prisoner to account to Mr. Smeed's manager on his return home to Sittingbourne after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed, and asked if he should not on his return take a load of manure down to Mr. Pye, of Cuxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place, Murston.

Going from London to Burham he would pass Cuxton.

Notwithstanding this prohibition, the prisoner took a barge load of manure from London down to Mr. Pye at Cuxton, and received from Mr. Pye's men 4*l* as the freight.

It was not proved that he professed to carry the manure, or to receive the freight for his master.

The servant who paid the 4*l*. said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom.

Early in December the prisoner returned home to Sittingbourne, and professed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London, and had returned empty to Burham as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries, the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the 4*l*. received from Mr. Pye for the freight for the manure.

The jury found the prisoner not guilty of larceny, but guilty as servant to Mr. Smeed of embezzling 2*l*.

It appearing to the Justices doubtful whether the prisoner having taken the cargo of manure without the authority and contrary to the expressed direction of his master, could be said to have received the 4*l*. for his master or by virtue of his employment, and it not being shown that he professed to receive it for or on account of his master, the Justices request the opinion of the Court of Crown Cases Reserved upon the question, namely,

Whether on the above-mentioned state of facts the prisoner could properly be convicted of embezzlement.

(Signed) JOHN G. TALBOT,
Chairman of West Kent Quarter Sessions.

No counsel appeared for the prisoner.

E. T. Smith (*Morton W. Smith* with him) for the prosecution.—
The question is whether the conviction for embezzlement as a servant can be sustained. The 24 & 25 Vict. c. 96, s. 68, differs from the previous enactment 7 & 8 Geo. 4, c. 29, s. 47, by the

omission of the words, "by virtue of such employment." Under the former Act it was not sufficient that a clerk or servant had received and embezzled the money of his employer, unless he had received it by virtue of his employment. [BOVILL, C.J.—The case of *Rex v. Snowley* (4 Car. & P. 399), is almost identical with this, but that case was before the 24 & 25 Vict c. 96. BLACKBURN, J.—How do you make out that on the receipt of the money by the prisoner it was received into the possession of the prosecutor, his employer? If upon that receipt it became the master's property, there would be an end of the case, but how do you establish that?] The money was paid to the prisoner for the owner of the barge. In *Rex v. Hartley* (Rus. & Ry. 139), which was like this case, the facts were these:—The prosecutor had a colliery and barges, and employed the prisoner as captain of one of his barges to carry out and sell coals, and his duty was to bring back the money for which the coals sold, but he was entitled to two-thirds of the difference between such money and the value at the colliery and duties. He sold coals so received by him at 18s. per chaldron, the value at the colliery being 14s. He embezzled the money received. It was held that he was a servant within the statute, and guilty of embezzling so much of the money as equalled the value at the colliery and duties. [BLACKBURN, J.—The way the money was earned here was in express disobedience of the master's commands. BOVILL, C.J.—It seems to be a misuser of his employer's property by the prisoner to earn money for himself. ARCHIBALD, J.—Could the master have brought an action for money had and received for this money?] In *Reg. v. Harris* (6 Cox C. C. 363; Dears. C. C. 334), a miller of a county gaol, grinding corn contrary to his duty and appropriating the money received for the grinding, was held not to have received the money by virtue of his employment, and upon a case reserved, Pollock, C. B., delivered the following judgment:—"The only point on which we give our unanimous opinion is, that upon the facts stated it appears that the prisoner had no right to receive and grind any corn on behalf of his masters, except such as was brought to him with a ticket. The reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket is, that he intended to make an improper use of the machinery intrusted to him, by using it, not for the benefit of his masters, but for the benefit of himself. We think, therefore, that the money which he received was not received on account of his masters, and that he cannot be said to be guilty of embezzlement." Mr. Greaves, in 2 Rus. on Crimes, 453 (4th edit.), has the following note upon *Reg. v. Harris*:—In *Reg. v. Harris*, Pollock, C. B., in the argument said, "If a workman employed in a blacksmith's shop, who has engaged to give his master his whole services, is asked by some one to do a little work in the shop which only requires labour, and he does the work and says to the man, 'Pay me twopence for the job and say nothing about it,' the workman could not be indicted for embezzling the two-

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pence, though he might be guilty of a breach of his contract, which was to give his master his entire labour. The supposed case is plainly distinguishable from this case. There the man's own bodily labour would earn the money. Here the money was earned by the mill of the county, and clearly for any work done by it the county might recover payment. The decision itself seems to be erroneous; for the prisoner could only work the mill 'by virtue of his employment,' and it is quite clear that the county might recover from the prisoner any money received by him as money had and received to their use, for it was earned by their mill, and the prisoner was paid for all the work he contributed towards it, and this plainly proves that the money was in fact received for and on account of his masters, though by a fraudulent juggle he attempted to show it was not so received. *Rex v. Snowley* was approved of by Parke, B., in this case; but in the Committee of the Lords on the Criminal Bills of 1860, on my reading that case, Lord Wensleydale and all the law lords greatly disapproved of it, and unanimously agreed to the propriety of preventing such a failure of justice in future by altering the clause as it now stands, and there is no doubt that it will meet such a case as the present." In *Reg. v. Thorpe* (8 Cox C. C. 28, D. & B. 552), the prisoner, a servant of the agent of a railway company who was employed to deliver goods according to a delivery book furnished by the company, and to account for moneys received to his master, received moneys and gave receipts in the name of the company. Held, nevertheless, that the moneys were received on account of his master.

BOVILL, C. J.—Under the former Act the words "by virtue of such employment" led to difficulties. And in *Rex v. Snowley*, and *Reg. v. Harris*, where the money embezzled had been received by a servant for his master, but not by virtue of his employment, it was held that the servant could not be convicted of embezzlement. In 24 & 25 Vict. c. 96, s. 68, those words have been left out, and it is enacted that whosoever being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any money, &c., which shall be delivered to, or received, or taken into possession by him for or in the name, or on the account of his master or employer, shall be deemed to have feloniously stolen the same from his master or employer. It is still necessary, therefore, that the money be delivered to, or received, or taken into possession by the servant for, or in the name, or on the account of the master or employer, to constitute embezzlement. Now in this case what the prisoner did was to use the barge for his own purpose to earn money, not for his master, but for himself. It is expressly stated, "that it was not proved that he professed to carry the manure, or to receive the freight for his master, and that the servant who paid the 4*l.* said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom." On the facts stated, it is more consistent

to infer that the prisoner was using his master's property for his own purposes than for those of his master. If that be the true view, the money was received by the prisoner for himself and not for his master. This case is therefore not within the statute, and the conviction must be quashed.

BRAMWELL, B.—I am of the same opinion. We must look at the substance of the thing. The wrong done was not in not paying over the money to his master, but in improperly using his master's chattel, and the case is well illustrated by a man improperly using his master's barge at a boat race and charging persons so much apiece to stand upon it to see the race. The man is no otherwise dishonest except in using his master's barge improperly. The case is certainly not within the words of the statute. The money was not received by the prisoner for or in the name or on account of his master. I doubt whether, though he had used his master's name in the transaction, the case would have been within the statute. For suppose a servant had a cart and horse of his own, and had used that as if it had been his master's, would a receipt of money in his master's name have sufficed then? In the desire to avoid difficulties, words have been introduced into the enactment which I think may at some future time create a difficulty.

BLACKBURN, J.—I am of the same opinion. It is still necessary under the present Act that the servant should have stolen his master's property, and it must still be the master's money when received by the servant. I cannot see that such is the case here. The prisoner had no authority to carry the manure in his master's barge; he was acting in a way that he had been forbidden to do by his master, and so earned the money. In what sense can it be said that the money so earned was the master's? If the money had not been paid, could the master have sued for it? There was no contract made with him.

ARCHIBALD, J.—I am of the same opinion. The only doubt raised is, whether the money earned by the use of the master's barge could be said to be the master's on an implied contract; but I think that when the manure was carried, as in this case, no action could have been brought by the owner of the barge for the freight of the manure.

HONYMAN, J., concurred.

Conviction quashed.

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MIDDLESEX SESSIONS.

Thursday, June 19.

(Before Mr. Serjt. Cox, Deputy Assistant Judge).

REG. v. RADCLIFFE.

*False pretences—Larceny—Second indictment for same offence—
Distinction between a false pretence and larceny by trick.*

The prisoner was indicted for feloniously stealing a dress, a shawl, and other articles of wearing apparel.

The evidence was that the prisoner, who had a wife living, but who represented himself as a widower, was paying his addresses to the prosecutrix, who was a widow; that in the course of conversation he told her that his late wife's father had just died (which was true), that his sister-in-law was unable to go to the funeral, being too poor to purchase mourning; that thereupon the prosecutrix, without request or suggestion from him, offered to lend her clothes for the purpose, and placing the articles in question in a bag gave them to the prisoner to take to his sister-in-law. Some of these articles of dress were worn by the prisoner's wife at the funeral, others were found to have been pawned by a woman not identified, who gave her name as that of the prisoner's wife. The prosecutrix afterwards made repeated requests to the prisoner to return the clothing she had lent to his sister-in-law, but could not obtain them. It appeared that the prisoner's wife had two sisters. One of them only was called for the prosecution to prove that the clothing had not been given to her by the prisoner.

It was contended for the prosecution that this was larceny by a bailee. The prosecutrix had given the clothes to the prisoner to deliver them to his sister-in-law, but instead of doing so he had converted them to his own use.

Held, that there was no case for the jury, inasmuch as, there being two sisters-in-law, there was no evidence that the prisoner had not delivered the clothes to a sister-in-law, in pursuance of the terms of the bailment, and also that there was no evidence of conversion to his own use, it not being proved that the clothes were pawned by the prisoner, but by a woman who might have been his sister-in-law who was not called to prove the non-receipt of the clothes by her.

The prisoner was then indicted for the misdemeanor of obtaining the same articles of clothing by falsely pretending, inter alia, that his sister-in-law was poor and unable to buy mourning wherewith to attend the funeral of her father.

An objection was taken on behalf of the prisoner that inasmuch as the possession only and not the property had been passed or intended to be passed by the prosecutrix, the offence, if any, was larceny and not false pretences.

So held.

It was then contended for the prosecution that by sect. 88 of 24 & 25 Vict. c. 96, it had been expressly enacted that the defendant may be convicted, although it appear at the trial that the offence amounts to larceny and not merely to obtaining money, &c., by false pretences, and therefore that if the jury should be of opinion that the property was obtained by a trick with intent to steal, it would amount to a larceny in law, and the prisoner might be convicted under this indictment by virtue of this provision of the statute.

For the prisoner it was contended, that having been acquitted upon the same evidence on a charge of larceny for stealing these very articles, it would be contrary to the spirit of the law if he could be convicted of the same larceny under the form of an indictment for false pretences.

The whole case was left to the jury, the judge intimating his concurrence with the views advanced on behalf of the prisoner, and stating that, if necessary, he should reserve the question for the Court of Criminal Appeal.

The distinction between a false pretence and larceny by a trick.

INDICTMENT for larceny.

Besley for the prosecution.

The prisoner was undefended.

The facts proved may be shortly stated thus :—

The prosecutrix was a widow. As she was walking through the Strand, the prisoner, who was a stranger to her, accosted her, said he knew what she was by her dress, stated that he was a widower, and, expressing sympathy with her, asked her to meet him again. They met accordingly, and ultimately he became a formal suitor. But the prisoner's wife meeting them together in the street, a scene ensued and the intimacy was broken off. Shortly before this the prisoner told her that the father of his deceased wife had just died, which was true, and that his deceased wife's sister wanted to go to the funeral, but was too poor to buy mourning. Upon this the prosecutrix, out of compassion to the prisoner's sister-in-law, put a quantity of her own mourning clothes into a bag and gave it to the prisoner, directing him to take them to his sister-in-law, and to return them to her after the funeral. The clothes were not returned, and when she asked for them the prisoner made evasive answers. Subsequently some of the

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clothes were found to have been pawned, but not by the prisoner. The person pawning them was a woman, not identified by the pawnbrokers, who gave the name of the prisoner's wife. A sister-in-law of the prisoner was called to prove that she was at the funeral, but that the clothes in question had not been given to her, and that the prisoner's wife wore some of them on that occasion. She proved also that she had another sister living, who was not called, but of whom all she could say was that she was not in circumstances likely to require borrowed mourning. After the warrant had been issued for the apprehension of the prisoner, the prosecutrix had repeated private interviews with him.

Besley for the prosecution, said that he charged this as a larceny by a bailee. The clothes had been given to the prisoner to give to his sister-in-law, which he had not done.

The JUDGE.—This is not proved. There are two sisters-in-law, and only one is called. *Non constat* but that the prisoner may have given them to the other sister-in-law, and then he would have done with them what he was directed to do. The burden of proof is upon the prosecution. It must be proved that the prisoner did not execute his contract of bailment, and that instead of so doing he feloniously converted the property to his own use. This has not been done. I must direct an acquittal.

The prisoner was again indicted for obtaining the same articles of clothing by false pretences.

The false pretence charged as being that which induced the prosecutrix to give the prisoner the clothes was, in substance, a statement by the prisoner that his deceased wife's father was dead, that his sister-in-law had no mourning, and was therefore unable to go to her father's funeral.

The evidence was the same as stated above.

Moody (*amicus curiæ*) said that as the prisoner was undefended he wished to direct his Lordship's attention to the cases in which it had been decided that, if the possession merely, and not the property, had been passed, or intended to be passed, the charge of misdemeanor could not be sustained.

The JUDGE.—Here the prosecutrix had clearly parted with the possession only and designed no more. The charge of false pretences could not be sustained.

Besley, for the prosecution, submitted that it was competent for him, under this indictment, to show it to have been a larceny. The 88th section of the 24 & 25 Vict. c. 96, expressly enacts that "if upon the trial of any person indicted for such misdemeanor it should be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." Under this provision it would be a question for the jury if the possession was obtained by a trick, and, if so, it would be larceny, and thus the case would clearly come within the provision.

Moody (amicus curiæ).—That raises another objection. The prisoner has been already tried and acquitted of the larceny of the self-same articles upon the same evidence. He could not now be convicted of the offence of which he has been acquitted.

Besley.—The statute makes no such exception. The only proviso is that, if acquitted of the misdemeanor, he shall not be liable for the larceny. It makes no provision for such a case as the present where he has been tried for the larceny and acquitted.

The JUDGE.—The point is new and very important, for, if Mr. Besley's argument is right, the effect of that statute will be to destroy the great principle of our law, that no man shall be twice put in peril for the same offence. It deprives the prisoner of his plea of *autrefois acquit*. I cannot take upon myself to set aside the express words of the section, but I shall reserve the point for the judges. The question here raised is most important. I will leave the facts to the jury, and on their finding take the opinion of the Court of Criminal Appeal on all the points that have been mooted, and I thank Mr Moody for the assistance he has rendered to the court.

The JUDGE to the jury.—It is distinctly proved that the clothes were parted with to the prisoner by reason of a statement that his sister-in-law was too poor to buy mourning, and therefore was prevented from attending her father's funeral. This statement roused the compassion of the prosecutrix, who thereupon offered to lend her own clothes to the woman, and delivered them to the prisoner for that purpose, with an injunction to return them after such use. It is, therefore, clearly shown that the prosecutrix parted with the possession only and not the property, and it has been decided that where this is the case the offence, if any, is larceny, and that an indictment for false pretences cannot be sustained. Here, then, I should have withdrawn the case from your consideration, but for a provision of the Criminal Law Amendment Act, that in any trial on a charge of false pretences, if the offence proved shall amount in law to larceny, the prisoner shall not be therefore acquitted, but may be convicted as if he had been indicted for larceny. It is contended on the part of the prosecution that this is a case coming directly within the provision of the Act, and that if you are of opinion that the prisoner obtained possession of the clothes by a trick, the offence would amount in law to larceny, and he might be convicted under this indictment. On the other hand, it has been suggested that as the law says that no man shall be put in peril twice for the same offence, and as the prisoner has been already tried for larceny of these very clothes and acquitted, it would be a violation of a most wholesome law if it could be permitted that, under the form of an indictment for false pretences, he should be tried again and possibly convicted of the larceny. I fully share in this objection, and I have great doubt whether such a construction would be put upon the statute. But as the language is clear and express, and there is no prohibition, as in the contrary case of an indictment

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for false pretences being first preferred, I cannot take upon myself to say that the statute does not intend what it appears to declare, and, if necessary, I shall reserve the point for the consideration of a superior court. But the question which I now leave to you, and of which I ask your opinion is, if upon the evidence it is proved to your satisfaction that the prisoner obtained the clothes by a trick and not by a false pretence; if you are of opinion that it was a trick, and not merely a false pretence, it would amount to a larceny in law, and the prisoner might be convicted. Therefore, I will endeavour to assist you in deciding this by directing your attention to the difference between false pretence and larceny by a trick. I can find no clear definitions in the books from which I can show you distinctly where the two offences differ. The boundary line is very fine indeed, and the cases are not clear, and upon this point also I shall ask the opinion of the judges. My own view of it is this: That a false pretence is a lie told or acted to influence the mind; but obtaining by a trick, so as to constitute larceny, is an imposition upon the senses. If this is not the distinction, I do not know what it is. Obviously, every indictable false pretence is in one sense a trick and a fraud, and anything obtained by it is obtained by trickery and fraud; and if the contention of the counsel for the prosecution be right, every false pretence would amount to larceny in law, and the misdemeanor might be abolished. My reading of the statute is this: That if the alleged false pretence should turn out not to be what is familiarly termed "a good false pretence," by reason of being something more, that is to say, if it appeared upon the evidence to be a larceny and not a false pretence (as was often found before the statute, when the endeavour was to prove that the prisoner had committed larceny and not merely a false pretence, and which, if sustained, procured an acquittal) in such case the prisoner should not be acquitted, but might be convicted of the larceny. Was this, then, a false pretence merely, or a trick? If you are of opinion that it was a false pretence merely, for the reason that I have stated, you must acquit the prisoner. But if it be your opinion that it was a trick, and that it was done with design to obtain possession of the clothes, and with intent, at the moment of taking them into possession, to convert them to his own use—that is, to steal them—you will say that he is guilty. But you must be satisfied that he had such intent in his mind at the time of practising the trick, and at the moment of receiving the clothes from the prosecutrix; for if it arose subsequently, as if, for instance, after having given them to his wife she had pawned them, or otherwise, he would not be guilty of larceny. Should you convict him, I shall reserve both the points I have stated for the consideration of the Court of Criminal Appeal.

Not Guilty.

COURT OF CRIMINAL APPEAL.

Saturday, May 31, 1873.

(Before BOVILL, C.J., BRAMWELL and CLEASBY, BB., GROVE
and ARCHIBALD, JJ.)

REG. v. REBECCA GOLDSMITH.(a)

*Indictment—False pretences—Receiving—Aider by verdict—24 & 25
Vict. c. 96, ss. 88, 95—7 & 8 Geo. 4, c. 64, s. 21.*

An indictment under 24 & 25 Vict. c. 96, s. 95, charged that defendant “unlawfully did receive goods which had been unlawfully and knowingly, and fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud, as in this count before mentioned,” but omitting to set out what the particular false pretences were.

Held, that the objection, not having been taken before plea, was cured by the verdict of guilty.

CASE reserved for the opinion of this Court by the Deputy Recorder of the City of London.

At a session of the Central Criminal Court, held on Monday, the 5th of May, 1873, Rebecca Goldsmith was tried before me upon an indictment containing fourteen counts for various misdemeanors.

The thirteenth count was as follows :

“ And the jurors aforesaid upon their oath aforesaid, do further present that the said Rebecca Goldsmith, afterwards to wit in the year of our Lord 1872, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court unlawfully did receive and have divers articles of jewellery, to wit (here followed a list of the goods alleged to have been unlawfully received) of the goods and chattels of the said Charles Drayson and others, which said goods and chattels in this count aforesaid had lately before then been unlawfully and knowingly and fraudulently obtained of and from the said Charles Drayson and others, by means of certain false pretences with intent to defraud. She the said Rebecca Goldsmith at the time she so as aforesaid unlawfully received and had the same goods and chattels then and there, well knowing

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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that the same goods and chattels had been obtained by means of certain false and fraudulent pretences with intent to defraud as in this count before mentioned. Against the peace of our said Lady the Queen, her crown and dignity.”

The fourteenth count was in the same form for receiving goods belonging to another owner.

At the close of the case for the prosecution, Mr. Giffard, Q.C. and Mr. Poland on behalf of the prisoner objected that the thirteenth and fourteenth counts were bad because they did not set forth the false pretences by means of which the goods had been obtained, and that, consequently, it did not appear that those false pretences were within the statute 24 & 25 Vict. c. 96, s. 88.

Mr. Metcalfe, Q.C., for the prosecution contended, first, that it was unnecessary in a substantive charge of receiving goods obtained by false pretences to set forth the specific false pretences by which they had been obtained ; secondly, that the allegation in the indictment that they had been unlawfully, knowingly, and fraudulently obtained by false pretences with intent to defraud, must be taken to mean that they had been obtained by false pretences, which were unlawful and fraudulent within the statute ; and, thirdly, that even if it were necessary as matter of form to set out the false pretences, yet the objection was too late, and ought to have been taken before plea by virtue of 14 & 15 Vict. c. 100, s. 25.

The prisoner was found guilty on the thirteenth and fourteenth counts only, and, doubting whether those two counts were good in form, and also doubting whether, if they were not good, the objection was taken in proper time, I reserved for the decision of the Court for Consideration of Crown Cases the two questions :

First, whether the two counts are good in form ; and, secondly, if they are not good whether the objection was too late.

If the counts are bad and the objection was in time, the conviction is to be annulled ; but if the counts are good or the objection was too late, the conviction will be affirmed.

(Signed) THOMAS CHAMBERS,
Deputy Recorder.

Giffard, Q.C. (*Poland* with him), for the prisoner.—The conviction cannot be sustained. The offence of obtaining goods by false pretences is governed by the 24 & 25 Vict. c. 96, s. 88, which enacts that “Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security shall be guilty of a misdemeanor.” Then the charge in the counts of the indictment upon which the prisoner has been convicted is dealt with in the sect. 95 in these terms : “Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor.” It has long

been settled law that in an indictment for obtaining goods, &c., by false pretences, the particular false pretences must be charged in the indictment (*Rex v. Mason*, 2 T. R. 581), in order to show that they are false pretences within the statute—the crime of obtaining goods, &c., by false pretences not being an offence at common law. Then the question arises whether the same rule is applicable to the offence of receiving goods knowing them to have been obtained by false pretences. [BOVILL, C.J.—The receiver may know that the goods have been obtained by false pretences and fraudulently, but he may not know the particular false pretences.] Nevertheless it must be proved what the false pretences are by which the goods have been obtained, and they should be stated in the indictment to show that as against the principal offender the case falls within the statute. It is consistent with the present indictment that the goods were obtained by a false pretence, that is not within the statute. The words of sect. 95 are “the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act.” This point appears to have been decided in *Reg. v. Hill* (Gloucester Spring Assizes, 1851, 2 Russ. on Crimes, 554, 4th edit., note *a*), where it was held that an indictment like this was bad. If the receiver were indicted along with the principal offender it is clear that the particular false pretences must be set out, and there is no reason why when the receiver is indicted alone, they should not also be set out. [ARCHIBALD, J.—Is it necessary to do more in an indictment than to set out the offence in the words of the statute, and would not an indictment following the words of the statute mean the same thing as the statute means?] As a general proposition that may be correct; but every allegation in this indictment may be fulfilled without showing any criminal offence. The words “unlawfully obtained” are not words of art, and have no technical meaning, and may be satisfied by a great many things which, though unlawful, are not indictable. The present indictment is really only an enlargement of the allegation, “contrary to the form of the statute.” Then, secondly, as to the time when the objection was taken. It was taken before verdict. [BRAMWELL, B.—It was taken after the prisoner was given in charge to the jury, who were sworn to try the issue joined between the parties. No injustice has been done, as the judge would tell the jury “You must not find the prisoner guilty upon this evidence, because it is not a statutory offence,” if the facts warranted him in so doing. It strikes me you should have demurred to the indictment, or moved in arrest of judgment.] The object in taking the objection at the close of the case for the prosecution is, that the prisoner has a right to know how the evidence applies to the offence charged. The 14 & 15 Vict. c. 100, s. 25, enacts that “Every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictments before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken,

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for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particulars; and thereupon the trial shall proceed as if no such defect had appeared." This objection is not a formal one; it is that the very offence itself is not described; and the indictment could only be amended under the statute by inserting words to set out the substantive offence. Even if the words "against the form of the statute" had been in the indictment, that would not have cured the want of allegations to bring the offence within the statute: (2 Hale P. C. 192.) The case of *Sill v. The Queen* (1 Dears. 132) shows that a substantial omission in an indictment is not cured by verdict. [BOVILL, C.J.—If there had been a demurrer to this count, what would it have admitted? BRAMWELL, B.—How can the court tell whether the grand jury have not returned a true bill on proof of a false pretence which is not within the statute? CLEASBY, B.—What do you say as to the effect of the 7 Geo. 4, c. 64?] Upon that statute *Reg. v. Wilson* (2 Mood. C. C. 52) decided that the indictment is bad after verdict if it does not allege that the goods have been obtained by false pretences, and that the receiver knew them to have been so unlawfully obtained. And in *Reg. v. Martin* (8 A. & E. 481), an indictment for obtaining goods by false pretences which did not show to whom they belonged, was held bad on error, and not to be cured by the 7 Geo. 4, c. 64, s. 21. Further, sect. 95 of 24 & 25 Vict. c. 96, says that "whosoever shall receive any chattel, money, or valuable security, knowing the same to have been unlawfully obtained." Now this indictment omits the word "unlawfully," and says "knowing the same had been obtained by means of certain false pretences." Is that cured by verdict? The indictment does not follow the words of the statute in this respect. *Reg. v. Turner* (1 Mood. 239) shows that where a statute makes it criminal to do an act unlawfully and maliciously, and the indictment does not state that it was done unlawfully, it is bad. See also *Reg. v. Ryan* (2 Mood. 15), *Reg. v. Davis* (2 Leach, 556), *Reg. v. Gray* (L. & C. 365).

Metcalf, Q.C. (*Straight* with him), for the prosecution.—The objection to the counts may be stated thus: the counts, it is said, must set out the false pretences, or must show by proper averments that it was such an obtaining as is within the statute. Now it is submitted that the latter has been done. This is a substantive offence of receiving goods which had been unlawfully obtained by false pretences. All that the statute requires to be proved is that the defendant knew that the goods were obtained by some false pretence, not that he knew the particular false pretence by which they were obtained. The precedents in *Archbold* and *Saunders* merely aver "knowing the goods to have been unlawfully obtained by false pretences" without setting out the false pretences. The case of *Reg. v. Mason* was before the 7 Geo. 4, c. 64, and the 14 & 15 Vict. c. 100, and would not now be followed. A count for conspiracy to evade payment of the customs

duties on goods imported need not specify what the goods were or the means of effecting the objects of the conspiracy: (*Reg. v. Blake*, 6 Q. B. 126.) So in an indictment against a bankrupt for not disclosing all his property, the want of particularity in the description of the goods was held to be cured by the verdict under 7 & 8 Geo. 4, c. 64, s. 21: (*Nash v. The Queen*, 4 B. & S. 953.) It has also been held sufficient to follow the words of the Debtors Act (32 & 33 Vict. c. 62) in an indictment for obtaining goods within four months of the bankruptcy by false representations, and to allege generally that the defendant did "by certain false representations" obtain goods on credit without specifying the false representations on the goods. *Reg. v. Watkinson* (12 Cox C. C. 271), and the 7 & 8 Geo. 4, c. 64, s. 21, was held to apply. *Heymann v. The Queen* (12 Cox C. C. 383) was also cited.

Giffard, Q.C., in reply.

BOVILL, C.J.—In an indictment for obtaining property by false pretences, there is no doubt that the false pretences ought to be set out. That was long ago decided. I am not aware whether the question has been raised, after verdict, since the passing of the statute of 7 & 8 Geo. 4, c. 64; nor is it necessary to go minutely into the question as to how far a general allegation in an indictment for obtaining goods by false pretences would be sufficient after verdict. This is an indictment for receiving goods obtained by false pretences, the prisoner being charged with so receiving them, knowing them to have been so obtained. No objection was taken at the trial before plea. The issue was joined, the prisoner was given in charge to the jury, and in the course of the trial, before the verdict, the objection was raised as to the form of the indictment, and that objection resolves itself into an objection to the two counts, the thirteenth and fourteenth counts, which are brought before us in this case. The objection being so raised, the judge, trying the case as between the Crown and the prisoner, was not bound at that stage of the proceedings to give any effect to the objection. If he had thought that the objection was clearly a good one, and that no conviction, if it took place, could be supported in point of law, he might have quashed the indictment; but the effect of quashing the indictment, under such circumstances, would simply have been to have left the prisoner open to another indictment. The judge, on an application of this sort, is clearly not bound to quash an indictment, however bad he may think it; if it is bad, he may generally do so; but if doubtful, he may leave the party, according to the old practice, to his writ of error; or, as now, reserve the point for the decision of this court. The prisoner, being in charge of the jury, the judge, if he did not quash the indictment, would be bound to direct the jury and to take their decision and verdict on the facts and evidence proved before him. In this particular case, the deputy recorder did not quash the indictment, but reserved the point for the opinion of this

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court, not as to whether this court would quash the conviction or not, but as to whether the count was a good count, which is a totally different matter. Though the objection was taken before the verdict was given, the only mode in which, it seems to me, we can give effect to the objection is by treating it as an objection raised after verdict. It was raised before verdict, but in order to give the prisoner the benefit of it, no regard must be paid to its having been raised at that stage, because the judge could not then give effect to it. We will deal with it, and are prepared to do so, as if the objection had been taken immediately after the verdict, as a motion in arrest of judgment. Dealing with it in that way, we must treat it as an objection raised in arrest of judgment, and as an objection raised after the verdict had been given. The reason of my stating this very distinctly is, that it seems to me that this is clearly not a case for annulling the conviction. The conviction by the jury must stand, for the question had been left to them. And after the attention of the deputy recorder had been drawn to this point, we cannot assume that he would not direct the jury properly and take care that they should find that an offence was committed of receiving goods obtained by false pretences according to law. But, independently of this, as a matter of fact and evidence, we must assume that the judge has properly directed the jury, and that the jury correctly found their verdict. The deputy recorder was not at liberty to withdraw the case from the jury, except by quashing the indictment; and we cannot deal with this matter as if it was withdrawn from the jury. Here we have the verdict of the jury, and the verdict must stand. Then the question arises as to the validity of these counts, that being the only mode in which, after verdict, the point can be properly raised, or brought before us for consideration. What is the objection that has been raised? It is, in distinct terms, that in this indictment the prosecution have not set forth the false pretences by means of which the goods had been obtained. That is the only objection, and although we are disposed to entertain this objection to the indictment, and to entertain it as a motion in arrest of judgment, yet it is manifest that in doing so we ought strictly to confine the question to that which was raised at the trial, and which was the only question intended to be reserved; otherwise parties raising a specific question at the trial, there being other points that might be fatal to the indictment, if not amended, might bring the case up to this court, and then rely upon the other objections which they had not referred to before, as grounds for arresting the judgment, when if they had been mentioned before to the presiding judge they would have been amended. That is one inconvenience. The practice of this court has invariably been to confine the question argued to the points that were raised, and the question intended to be submitted to it. I therefore deal with the question of the validity of these counts, with

reference to the objection raised, that objection being simply this—that the false pretences by means of which the goods were obtained were not set forth: that it does not appear from the counts that any offence was committed, because the false pretences might be such as were not criminal, and that it ought to be shown on the indictment that the false pretences were such as the law considers false pretences within the meaning of the present statute. It seems to me, that the utmost that can be said is that the count is uncertain, that the false pretences alleged may be false pretences within the meaning of the statute, or may not be within the meaning of the statute. But the indictment being in general terms, the judge would take care that the substance was submitted to the jury, and would direct the jury what false pretences would be necessary to be proved in order to sustain the indictment, and the jury must be presumed to find in accordance with the direction of the judge. The statute under which the prisoner is indicted is the Larceny Act of the Consolidation Statutes, and sect. 95 enacts that “whosoever shall receive any chattel or other property, the obtaining whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof.” Sect. 88 says, that “Whosoever shall by any false pretence obtain from any other person any chattel, and so forth, with intent to defraud, shall be guilty of a misdemeanor.” Those are the words of the Act, which is substantially a re-enactment of the previous consolidation statute of 7 & 8 Geo. 4, c. 29. There is an uniform course of pleading, and precedents are to be found in the books; and according to them in an indictment for receiving goods which have been obtained by false pretences it has not been the practice to set forth the false pretences. These counts have been so framed, not setting out what the false pretences were. Before we come to a conclusion that so long and uniform a course of precedent is wrong, we ought to be very clearly satisfied on the point. It is not material, as it seems to me, to determine whether in strictness it is necessary before verdict to set forth the false pretences in this form of indictment. The question here arises after verdict; and the only way it can be raised is that to which I have already adverted, namely, treating it as a motion in arrest of judgment. The language of the Act of Parliament, so far as this point as raised on the trial is concerned, has been followed, because the allegation is that the goods had been obtained by means of certain false pretences with intent to defraud; and that raises the question as to what is the effect of the statute of the 7 & 8 Geo. 4, c. 64, s. 21. That section enacts that “where the offence charged has been created by any statute, the indictment shall, after verdict, be held sufficient if it describe the offence in the words of the statute.” Here is a case in which, so far as the objection taken at the trial is concerned, the offence is described

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in the terms of the statute. This court is confined to that objection. It seems to me, therefore, that by the express enactment of 7 & 8 Geo. 4, c. 64, s. 21, the offence being described in the language of the statute so far as this point is concerned, the objection, if taken, must be cured after verdict. Independently of this statute, there would be strong grounds for contending that the objection was cured by verdict after the decision in *Heyman v. The Queen* (12 Cox C. C. 383). A further question was raised and argued before us. It was contended that the objection was cured as a formal defect under 14 & 15 Vict. c. 100, s. 25. In the view which I take of this case I think it unnecessary to consider that matter, because if, as I think is the case, the objection is cured after verdict by the statute of 7 & 8 Geo. 4, c. 64, s. 21, this conviction ought to stand. It is not necessary to determine what is the effect of the other statute; it is sufficient to say that the objection is cured by the 7 & 8 Geo. 4, c. 64, s. 2, and that therefore the judgment cannot be arrested, and that the conviction must stand.

BRAMWELL, B.—The objection taken in this case is that for a particular reason assigned, the indictment is bad—that it shows no offence. When one bears in mind that this is the real objection, it is manifest that it was taken at the wrong time. The prisoner was then in charge to the jury, and the question then to be determined was whether or no she was guilty of this charge, as laid in the indictment. The objection to be taken was by a motion to quash the indictment, or by a demurrer, or by a motion in arrest of judgment. I mention this for the same reason as the Lord Chief Justice did, in order that it may be seen what is the principle of the decision. If the objection had been taken on a motion to quash or on demurrer, I do not for my own part say that this would have been a good count; and if I might recommend the very able gentlemen who draws these indictments at the Central Criminal Court, I think it would be just as well that they should preclude such an objection being taken by demurrer or motion to quash on a future occasion. But I cannot help thinking that on principle this defect must be cured by the verdict. Let us see what the rule is. It is mentioned in the note to *Stennel v. Hogg* (1 Wm. Saun. 221). It is this: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer; yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." Is not that strictly applicable here? It is supposable that if a false pretence by what we may call the primary offender, which must have been proved at the trial, if that false pretence

had been what I think Mr. Giffard called a prospective false pretence—not an existing fact, but only a future matter—it is to be supposed that the judge would allow that to go to the jury? It certainly is not. Therefore, on reason and principle, one would think this objection was cured by the verdict. Then Mr. Giffard has cited to us the case of *Rex v. Mason*; and upon that I really think I ought to make an observation, because no doubt if the argument I am using now is a good one, one would think it might have been used in that case. But it was not used, for I don't find that the counsel for the Crown referred at all to the fact that the verdict had been given, nor did either of the learned judges notice that matter. I cannot say, therefore, that that is a satisfactory authority; and I very much concur in the remark of my brother, Mellor, J., in *Heymann v. The Queen*, that that case is not strengthened by later decisions. That is the ground of my judgment in this case. When I say that the objection was not taken at the proper time, I dare say the learned counsel took it as early as they possibly could, and must be taken as having been repeated after the verdict was given; otherwise, in my opinion, we should have no jurisdiction at all. I am not sure, but I think the objection taken would comprehend the objection relied on, because, although the objection taken was that the indictment did not set forth the false pretences on which the goods had been obtained, yet in reality if the indictment did not and ought to have done so, then the offence of the prisoner was not properly set forth; nor am I at all sure that the objection could have been got over in any other way than that which I have adverted to. But I think the legal defect, if any, is cured by the verdict. I might venture to make this remark; it would be as well in future, when objections of this kind are taken, that their nature should be ascertained; that the question should be reserved, if at all, whether we should arrest the judgment. It is possible, if objections were taken in that form, the judge would say, "No; I won't reserve a point of that sort, take your writ of error." Be that as it may, I am of opinion, for the reasons I have given, that this conviction should stand.

CLEASBY, B.—I am of the same opinion. My brother Bramwell has alluded to a note in Saunders' Reports; I adopt the application of the same principle to a criminal case in the way laid down by Mr. Justice Blackburn in *Heymann v. The Queen*, the propriety of which decision I do not see the slightest reason for doubting. He says: "I think it is a general rule of pleading at common law (and I think it necessary to say that where there is a question of pleading at common law, there is no distinction between the pleadings in civil cases and criminal cases), that where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue, without proof of this averment, then, after verdict, the defective averment, which

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might have been bad on demurrer, is cured by the verdict." Is this or is it not a case of defective averment? And is it or not a case of an averment which must have been proved in the sense in which it ought to have been averred in order to justify the verdict of guilty in the case? As I read it, it is this: "Unlawfully, and knowingly, and fraudulently obtained by means of certain false pretences." That is said to be a defective and imperfect averment, because it does not show sufficiently what is alleged. I do not say it is an objection; but supposing it to be one now, it is not alleged that the false pretences were of such a nature as to make the obtaining of the goods by them a criminal offence. The case having gone to the jury, it is manifest that the receiving the goods could not be made an offence unless they were obtained by criminal false pretences. It appears to me, therefore, that, as far as regards this objection, which is the only one with which I shall deal, this is a case of imperfect averment, because the verdict could not have been given unless the averment had been proved in the sense in which it ought to have been averred.

GROVE, J.—I am of the same opinion. It seems to me to come within the rule of *Jackson v. Pesked* (1 M. & S. 234). And the argument in that case was this: "Where a matter is so essentially necessary to be proved that, had it not been given in evidence, the jury could not have given such a verdict, the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intentment, will be cured by the verdict." I think these words accurately apply to the present indictment.

ARCHIBALD, J.—I am of the same opinion.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

Saturday, May 3, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, ARCHIBALD
and HONYMAN, JJ.)

REG. v. W. BROWN MATTHEWS.(a)

Larceny—Finding—Bailee.

The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on his, S.'s, marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away as his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them.

The jury found (1) that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. (2) That at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently. (3) That the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use.

Held, that a conviction of larceny, or of larceny as bailee, could not be sustained under the above circumstances.

CASE reserved for the opinion of this Court by the Recorder of Norwich.

This was an indictment tried before me at the Quarter Sessions for the City of Norwich, held on the 31st day of December, 1872.

It charged that William Brown Matthews, in the month of September last, at the Hamlet of Thorpe, in the county of the City of Norwich, feloniously did steal two heifers, the property of Robert Huggins, value 30*l*.

The prisoner is a publican, and also hires marshes, which he uses for the agistment of stock belonging to various persons. These marshes adjoin Carron Bridge-road, and on the other side

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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of the road are similar marshes, under the charge of Christopher Stiles, which are used for the same purpose, and cattle are sometimes left by the owners on these marshes, without notice to the persons in charge, and the agistment afterwards paid on their being taken away. They are near to the prisoner's house, but the fences thereof are defective.

The prosecutor, on the 14th of September, sent the two heifers in question to be agisted on the marshes, under the management of Stiles. The person who brought them did not inform Stiles he had done so, but Stiles afterwards saw them there.

On or about the following Wednesday, the 18th of September, the heifers strayed out of the marshes on to the public road, and were there found by the prisoner, who put them upon his own marshes.

Soon after, the prisoner told Stiles that he had found two heifers, and asked if he knew to whom they belonged. Stiles told the prisoner that he did not then know, but that they had been put on the marshes which were under his care, and the prisoner then said he had them on his marshes, to which Stiles made no objection.

A few days after Stiles told the prisoner that the heifers belonged to Mr. Huggins. At that time the prisoner had the heifers on his aforesaid marshes, and so kept them for a day or two, and until the 10th of October, when he sent them away twenty-five miles from Norwich, to be taken care of for him, at a place called Ryburgh, by a person who knew nothing of the circumstances, and received them as the property of the prisoner. About three days afterwards the prisoner told Stiles he had lost the heifers, and though he perfectly well knew where the heifers were, he on two other occasions denied all knowledge of where they were or what had become of them. On the 16th of December the police found the heifers at Ryburgh, where they had been kept for the prisoner, and with his knowledge, for more than two months after he had learned who the owner was.

I told the jury, first, that if the prisoner, at the time he found the heifers, had a reasonable expectation of ascertaining who the owner was, and did not believe that they were abandoned, and took them into his possession with the intention of appropriating them to his own use and depriving the owner of them, that would amount to a felonious taking in law, and they ought to find the prisoner guilty.

Secondly, that if, after the conversation with Stiles, in which he had been informed that the heifers had been left in his (Stiles's) marshes by an owner then unknown, he continued to hold them for such owner, and shortly afterwards sent them away with the intent and for the purpose of depriving the owner of his heifers, and appropriating them to his own use, I should advise them to find that he was guilty of a felonious taking.

The jury found the prisoner guilty, but in order to raise the questions submitted by the counsel for the prisoner, I put the

following questions to the jury, and received the following answers :—

Firstly, whether at the time the prisoner first took the heifers he had reasonable expectation that the owner could be found, or did he believe that they had been abandoned by their owner ?

Secondly, when the prisoner first took the heifers did he intend to steal them, or did the intention to steal come upon him subsequently to his first conversation with Stiles on the subject of the heifers ?

Thirdly, whether when the prisoner sent them away on the 10th of October, was it for the purpose of depriving the owner of them, and appropriating them to his own use ?

At the request of the prisoner's counsel I submitted the question also to the jury, whether at the very time he first possessed himself of the heifers the prisoner had an intention of appropriating them to his own use ?

The jury found—

Firstly, that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner.

Secondly, that at the time of finding the heifers the prisoner did not intend to steal them, but that the intention to steal came on him subsequent to his first interview with Stiles.

Thirdly, that the prisoner, when he sent the heifers away on the 10th of October, did so for the purpose and with the intention of depriving the owner of them, and that the prisoner did intend to appropriate them to his own use.

But as to the question also submitted to the jury, whether at the very time he found the heifers the prisoner had an intention of appropriating them to his own use, the jury replied "No." Upon the foregoing finding of the jury, I directed the verdict of guilty to be recorded, and allowed the prisoner's counsel to take a case for the opinion of the Court, and directed that the prisoner should be admitted to bail upon his finding sufficient sureties. Judgment was deferred until next sessions.

(Signed) P. FRED. O'MALLEY,
Recorder of Norwich.

No counsel appeared to argue on either side.

BOVILL, C.J.—We have considered this case, and have come to the conclusion that the conviction must be quashed. The jury have found that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. But at the same time they have found that at the time of finding the heifers the prisoner did not intend to steal them, but that the intention to steal came on him subsequently to the first interview with Stiles. That being so, the case is undistinguishable from *Reg. v. Thurborn* (3 Cox C. C. 453), and the cases which have followed that decision. Not having any intention to steal

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when he first found them, the presumption is that he took them for safe custody, and unless there was something equivalent to a bailment afterwards, he could not be convicted of larceny. On the whole we think there was not sufficient to make this out to be a case of larceny by a bailee.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, ARCHIBALD,
and HONYMAN, JJ.)

REG. v. NEGUS.(a)

Embezzlement—Clerk or servant.

A person engaged to solicit orders and paid by commission on the sums received, which sums he was forthwith to hand over to the prosecutors, was at liberty to apply for orders when he thought most convenient, and was not to employ himself for any other persons.

Held, not a clerk or servant within 24 & 25 Vict. c. 96, s. 68 (embezzlement).

CASE reserved for the opinion of this Court.

John Negus was tried before me at the Middlesex Sessions on the 25th March, 1873, for embezzling the sum of 17*l.* as clerk and servant to Roape and others.

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums received through his means. He had no authority to receive money, but if any was paid to him he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors.

Contrary to his duty he applied for payment of the above sum, and having received it he applied it to his own use, and denied, when asked, that it had been paid to him.

The prisoner's counsel contended that he was not a clerk or

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

servant within the meaning of the statute, but I refused to stop the case, and directed the jury to find him guilty, subject to a case to be reserved for the decision of this Honourable Court.

The question for the opinion of this Honourable Court is Whether upon the facts herein stated the prisoner was a clerk or servant, and as such rightly convicted of the crime of embezzlement?

If this Honourable Court shall decide this question in the affirmative, the conviction is to be affirmed. If on the contrary, the conviction is to be quashed.

(Signed)

W. H. BODKIN,

Assistant Judge.

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ment—
Clerk or
Servant.

No counsel appeared to argue for the prisoner.

F. H. Lewis for the prosecution.—It is submitted that the prisoner was a clerk or servant within the meaning of the statute. This is not like the case of *Reg. v. Bowers* (10 Cox C. C. 250), where a person who was employed to sell coals on commission, and to collect moneys on account of such orders, was held not to be a clerk or servant, he being at liberty to dispose of his time as he thought best, and to get or abstain from getting orders as he might choose. [BOVILL, C.J.—Here the case states that the prisoner was at liberty to apply for orders whenever he thought most convenient.] In *Reg. v. Bailey* (12 Cox C. C. 56), a person employed as traveller to solicit orders and collect moneys due on the execution of the orders, and paid by commission, and who was at liberty to get orders when and where he pleased within his district, but was to give his whole time to the service of the prosecutors, was held to be a clerk or servant within the statute. So in *Reg. v. Tite* (8 Cox C. C. 458), where a traveller paid by commission, and employed to get orders and receive payments, but bound to devote the whole of his time to his employer's service, was held to be within the statute, although he was at liberty to receive orders for other persons also. So in *Reg. v. William Turner* (11 Cox C. C. 551), a traveller who agreed to employ himself in going from town to town in the United Kingdom, and solicit orders for the prosecutor, and not to act without the prosecutor's assent for himself or any other person, was held to be a clerk or servant within the statute. In this case the prisoner engaged not to employ himself for any other persons.

BOVILL, C.J.—The question submitted to us is whether on the facts stated the prisoner was a clerk or servant, the learned judge at the trial having directed the jury to find him guilty, subject to a case reserved for the decision of this court. Generally speaking the question whether a person employed is a clerk or servant depends on so many considerations, that it should be left to the jury. It is extremely difficult on the mere statements in this case to say whether the prisoner was a clerk or servant.

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It appears to me that there is not enough stated to make out that he was a clerk or servant. One ground is to ascertain whether the person was bound to obey the orders of his employer so as to be under the control of his employer. There is not sufficient stated here to show that the prisoner was under the control and bound to obey the orders of or to devote the whole of his time as his employer directed, all that is stated is that he was not at liberty to employ himself for any other persons than the prosecutors; he was at liberty to amuse himself or get orders as he pleased. The facts stated do not make out that the prisoner was a clerk or servant. In all these cases it is more convenient that the question should be left to the jury.

BRAMWELL, B.—The conviction must be quashed unless we see on the facts stated that the prisoner must have been a clerk or servant. I am of opinion that the court cannot see that. The statute applies not to the cases of agents, but, in popular language, to cases of master and servant. In *Reg. v. Bowers, Erle, C.J.*, says: "The cases have established that a clerk or servant must be under the orders of his master or employer to receive the moneys of his employer to be within the statute; but if a man be entrusted to get orders and receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute." That I think is good law and applicable to this case.

BLACKBURN, J.—I am of the same opinion. The test whether a person is a clerk or servant within the meaning of the statute, is whether the person is under the control of and bound to obey the orders of his employer; he may be so without being bound to devote the whole of his time to his employer's service. In this case there is nothing inconsistent with the prisoner's being a commission agent, except that he engaged not to employ himself for any other persons than the prosecutors. On these facts, I think he was not shown to be a clerk or servant within the statute.

ARCHIBALD and HONYMAN, JJ., concurred.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN and LUSH, JJ., POLLOCK, B., and HONYMAN, J.)

REG. v. RICHMOND.(a)

Larceny—Servant—Bailee—24 & 25 Vict. c. 96, s. 3.

A traveller was entrusted with pieces of silk (about 95yds. each) to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any might have been sold, and the numbers, quantities, and prices of the silk sold. All goods not so accounted for remained in his hands, and were counted by his employers as stock. At the end of each half-year it was his duty to send in an account for the entire six months, and to return the unsold silk. He was paid by a commission.

Within six months after four pieces of silk had been delivered to him, the prisoner rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use.

Held, that he could be properly convicted of larceny as a bailee.

CASE reserved for the determination of the Court for Consideration of Crown Cases Reserved by Mr. Serjeant Cox, Deputy Assistant Judge at the Middlesex Sessions.

The prisoner was indicted at the Middlesex Sessions on the 30th of September, 1873, for stealing four pieces of silk from Robert Seneschal and others, his masters.

The prosecutors were silk merchants. The prisoner was engaged to sell silk for them, travelling about the country for that purpose.

His duties were stated to be as follows :

The prisoner carried with him on his journeys pieces of silk, each piece being about ninety-five yards, which he sold to customers of his own finding. He travelled with them where he pleased and when he pleased, and was paid by a commission on the sales effected. It was his duty to send to his employers by the next post after sale the names and addresses of all customers,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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whether they had paid cash for the goods purchased or otherwise, and in such accounts to state the numbers of the pieces of goods so sold, and the quantity and the prices at which they were sold.

The prisoner generally collected the moneys, but occasionally the customers remitted directly to the firm. He sold in the name of the firm and not in his own name. All goods not so accounted for remained in his hands, and were counted by the firm as stock. The prisoner paid his own travelling expenses, and at the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold stock.

The prisoner received from the firm, *inter alia*, four pieces of silk, each of ninety-five yards, numbered respectively 13,309, 12,866, 13,382, and 12,956. In February he rendered an account which was produced, in which he had entered as having sold to two persons, whose names and addresses were there stated, the above four pieces of silk, with instructions to send invoices for the customers, charging them respectfully 57*l.* and 62*l.* for the goods so sold, and in his half-yearly account, rendered 31st of December, he returned those pieces of silk as having been so sold. The firm sent the invoices according to the directions given by the prisoner. But the prisoner had previously left at the address he had given as that to which the invoices were to be sent, several envelopes addressed to himself at his residence in London, requesting that any letters that should arrive for him might be enclosed and posted. The invoices sent by the firm were thus returned to the prisoner. The firm never received payment for those four pieces of silk, and upon inquiry discovered that there were no such persons as the customers whose names had been returned by the prisoner, and that in fact he had not duly accounted for those pieces of silk, but had appropriated them to his own use.

Upon these facts it was contended for the prisoner that he was not a servant of the prosecutors, therefore could not be guilty of larceny of the goods entrusted to him.

It was contended for the prosecution that if not a servant so as to make his possession the possession of his employers, he was a bailee of the pieces of silk, and guilty of larceny as such.

I held that upon these facts the prisoner was not a servant, but that he was a bailee, and I directed the jury that they might find him guilty if satisfied that he had received the pieces of silk from his employers to sell for them, and instead of doing so had appropriated them to his own use.

The jury found the prisoner guilty.

On the application of counsel for the prisoner, I postponed passing sentence, and remitted the prisoner to gaol and reserved the question whether I rightly decided that he was a bailee of the silk for the opinion of this Court.

(Signed)

EDWARD WM. COX,
Deputy Assistant Judge of Middlesex.

Mead, for the prisoner.—The prisoner was not a bailee. According to *Reg. v. Hassall* (30 L. J., 175, M. C. ; 8 Cox C. C. 302), a person who is not bound to return the specific thing entrusted to him is not within the bailee clause (sect. 4 of 24 & 25 Vict. c. 54). Here the prosecutors entrusted the goods to the prisoner for sale, and at the end of each half year it was his duty to account to his employers. In *Reg. v. Henderson* (11 Cox C. C. 593), where jewellery was entrusted to the prisoner for the period of a week or so to show to customers for sale, and then to be returned if not sold, and after the given period the prisoner sold the jewellery and appropriated the proceeds, this Court held that the prisoner was properly convicted for larceny as a bailee. There the appropriation was after the lapse of time within which the prisoner was allowed to deal with the jewellery. In the present case the appropriation was before the lapse of the period of six months within which he could deal with the silk, and before he was bound to return in specie the unsold silk ; and therefore it is contended he could not be convicted as a larcenous bailee of the silk.

Besley, for the prosecution, was not called upon to argue.

KELLY, C.B.—All that is said about the six months in the case is, “The prisoner paid his own travelling expenses, and at the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold silk.” But here, a short time after receiving silk, the prisoner rendered an account in which he had entered as having sold to two persons, whose names and addresses were there stated, the four pieces of silk, with instructions to send invoices to them, and which was all a fabrication. How can it be said that he was not a bailee of the silk at the time, and that this was not larceny by a bailee ?

BLACKBURN, J.—The prisoner was bailee of the silk from the moment he received it from his employers. The silk was not his, but theirs ; and he was not authorised to dispose of it to his own private use.

LUSH, J.—The prosecutors might have demanded the silk back from the prisoner at any moment after it was delivered and remained undisposed of to customers.

POLLOCK, B. and HONYMAN, J. concurred.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN and LUSH, JJ., POLLOCK, B.,
and HONYMAN, J.)

REG. v. ROBERT BARRATT.(a)

Rape—Consent—Idiot girl.

Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is, that if they are satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty. The two cases of Reg. v. Fletcher (infra) are not adverse to one another. The principle is properly laid down in the first case, and the second case was only a decision on the facts that there was not that requisite testimony of want of assent to justify leaving the case to the jury.

CASE reserved for the opinion of this Court by Honyman, J.

The prisoner, Robert Barratt, was tried before me at Leeds Summer Assizes, 1873, for a rape on Mary Redman.

It was proved by the relatives of Mary Redman that she was fourteen and half years old, and that ever since she was six weeks old she was blind and wrong in her mind; that she was hardly capable of understanding anything that was said to her, but that she could go up and down stairs by herself; that if placed in a chair by anyone she would remain there till night; that if told to lie down she would do so; that she could not communicate to her friends what she wanted; that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work; that the prisoner had known Mary Redman and her family about two years, and knew that she was not right in her mind.

It was proved by a surgeon that there were no external marks of violence, but that, in his opinion, there had been recent connection, and he thought she had been in the habit of having connection.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Mary Redman was brought into Court, but not sworn. She was evidently idiotic, and I found it impossible to communicate with her. When I spoke to her she evidently heard a sound, and grinned, but made no reply, except a vacant laugh, and played with her handkerchief, which she had dressed up in the shape of a doll, and mumbled in her mouth.

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It was proved by the evidence of her father that on returning home one day he looked through the window of the sitting room, and saw the prisoner lying on Mary Redman on a couch in the room, on which she had been previously placed by her sister (whom the prisoner then sent on an errand to a distance), and who desired Mary Redman to lie on the couch till her return, and that on going into the room he found the prisoner standing up at the end of the couch buttoning up his trousers, while Mary Redman was lying quietly on the couch. The prisoner asked the father not to say anything about it.

Beyond this there was no evidence to show under what circumstances the prisoner had or attempted to have connection with the girl.

For the prisoner it was submitted that there was no sufficient evidence of penetration, or that what took place was without the girl's consent, or against her will.

I declined to stop the case, but reserved for the Court of Criminal Appeal the question whether I ought, under the circumstances, to have directed the jury to acquit the prisoner.

I told the jury that if the prisoner had connection with the girl by force, and if the girl was in such an idiotic state that she did not know what the prisoner was doing, and the prisoner was aware of her being in that state, they might find him guilty of rape; but if the girl, from animal instinct, yielded to the prisoner without resistance, or if the prisoner, from the girl's state and condition, had reason to think the girl was consenting, they ought to acquit him.

The jury found the prisoner guilty of an attempt at rape, and I admitted him to bail.

The question for the opinion of the Court of Criminal Appeal is whether, under the circumstances, I ought to have directed the jury to acquit the prisoner. If so, the conviction to be quashed or otherwise affirmed.

See the cases: *Reg. v. Fletcher* (8 Cox C. C. 131); *Reg. v. Fletcher* (10 Cox C. C. 248; s. c. L. Rep. 1 C. C. R. 39); *Reg. v. Lock* (L. Rep. 2 C. C. R. 10; 12 Cox C. C. 244.)

(Signed) GEORGE E. HONYMAN.

No counsel was instructed to argue for the prisoner.

Forbes for the prosecution.—I submit that the conviction ought to be affirmed. At the trial it was supposed that the two cases of *Reg. v. Fletcher* were adverse to one another and that the first was overruled by the second, but that is not so. The test is as to the degree of idiotcy of the prosecutrix, whether it is or not of so

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great extent as to render her incapable of giving consent, or of exercising any judgment upon the matter. In the first case of *Reg. v. Fletcher* the Court held that it was rape to have connection with an idiot girl incapable of giving consent, and the facts clearly proved absolute idiotcy in the girl. In the second case of *Reg. v. Fletcher*, the girl displayed a greater amount of intelligence than the girl did in the present case, and the medical evidence was that she was a fully-developed woman, and might have strong animal instincts. The case was left to the jury, in the terms reported to have been used by Willes, J., "that if they were satisfied that the girl was in such a state of idiotcy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty," and the jury found the prisoner guilty. The point was reserved for this Court, whether the case ought to have been left to the jury at all, there being no evidence against the prisoner except the fact of connection and the imbecile state of the girl, and this Court held that there was no evidence to establish either that it was against her will or without her consent. [BLACKBURN, J.—In that case the girl was far more capable of giving consent than here.] In *Reg. v. Barrow* (38 L. J. 20, M. C.; 11 Cox C. C. 191), it was decided that, to constitute a rape on a woman conscious and capable of giving consent at the time of connection, there must be an actual resistance of the will. Non-resistance by a woman, under the misapprehension induced by the man that he was her husband, prevents the offence being a rape. But here the girl was an idiot and incapable of giving consent. In *Reg. v. Lock* (12 Cox C. C. 244), it was held that mere submission by a child of tender years to an indecent assault, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to assent.

KELLY, C. B.—I am of opinion that the prisoner, in point of law, was guilty of the crime of rape in this case. I entirely concur in the definition of the crime of rape, as given by Willes, J. in his direction to the jury, "that if the jury were satisfied that the girl was in such a state of idiotcy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty." In this case the poor creature was not capable of giving her consent. As to the cases of *Reg. v. Fletcher*, I cannot see the distinction between them in principle.

BLACKBURN, J.—I am of the same opinion. I agree with the decision in the first case of *Reg. v. Fletcher* and think that the correct rule was laid down in that case. I do not think that the Court in the second case of *Reg. v. Fletcher* intended to differ from the decision in the first case of *Reg. v. Fletcher*. In all these cases the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment upon the matter, or, in other words, is

there sufficient evidence of such an extent of idiotcy or want of capacity. In the first case of *Reg. v. Fletcher*, and also in the present case, there was evidence of such an extent of idiotcy in the girl as to lead the jury to believe that she was incapable of giving assent, and that therefore the connection was without her consent. In the second case of *Reg. v. Fletcher*, the evidence of that was much less strong, and the point reserved for the Court was whether the case ought to have been left to the jury at all, there being no evidence except the fact of connection and the imbecile state of the girl; and all that the Court said was, that some evidence of its being against her will and without her consent ought to be given in these cases, and that there was not in that case the sort of testimony on which a judge would be justified in leaving it to a jury to find a verdict. Upon the authority of the decision in the former case of *Reg. v. Fletcher*, it is enough to say in this case that the evidence^h here was that the connection was without the girl's consent.

LUSH, J.—I am of the same opinion. I do not collect from the decision in the second *Reg. v. Fletcher* that it was intended to overrule, but only to distinguish it from, the first case and to uphold the first case.

POLLOCK, B.—I am of the same opinion.

HONYMAN, J.—I am of the same opinion. The decision in the second case of *Reg. v. Fletcher*, that there was not the proper sort of testimony requisite in these cases, brings it within the principle acted on in the first case, where there was the proper testimony. This case seems to me the same as when a man has connection with a drunken woman whom he finds lying in a road, quite incapable of giving consent, in which case Lord Campbell said it would be monstrous to say that the man would not be guilty of rape.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN, and LUSH, JJ., POLLOCK, B.,
and HONYMAN, J.)

REG, v. CHRISTIAN.(a)

Agent—Fraudulent conversion of money—Direction to apply same to a given purpose—24 & 25 Vict. c. 96, s. 75.

A stock and share dealer was in the habit of buying for S. gratuitously and receiving cheques on account. On the 27th of November he wrote informing S. that 300l. Japanese bonds had been offered to him in one lot, and that he had secured them for her, and that he had no doubt of her ratifying what he had done, and inclosing her a sold note for 336l., signed in his own name. S. wrote in reply, "that she had received the contract note for Japan shares and had inclosed a cheque for 386l. in payment, and that she was perfectly satisfied that he had purchased the shares for her." In fact, the bonds had not been offered to the dealer in one lot, but he had applied to a stock jobber and agreed to buy three at 112l. each, but never completed the purchase.

Held, that S.'s letter was a sufficient written direction, within the meaning of 24 & 25 Vict. c. 96, s. 75, to apply the cheque to a particular purpose, viz., in payment for the bonds.

THE prisoner was tried before me at the October Sessions of the Central Criminal Court, 1873, for converting to his own use or benefit the proceeds of a cheque for 336l., with which he had been entrusted as the agent of one Mary Anne Spooner, contrary to the statute 24 & 25 Vict. c. 95, s. 75. (b)

The prisoner was a stock and share dealer, carrying on business at 11, Royal Exchange.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

(b) The 24 & 25 Vict. c. 96, s. 75, enacts that whosoever having been entrusted as a banker, merchant, broker, attorney, or other agent with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security, or the proceeds of such security, for any purpose, or to any person shall in violation of good faith and contrary to the terms of such direction, convert to his own use or benefit, or the use and benefit of any person other than the person by whom he shall have been so entrusted, such money, security, or the proceeds thereof, shall be guilty of a misdemeanor.

In the year 1872 a Mrs. Spooner, a widow, was introduced to the prisoner, and the prisoner offered to make any investments for her that she might wish, and told her that out of respect for her late husband he would not make her any charge for so doing.

Between this time and the 1st of November, 1872, the prisoner purchased for her at different times a variety of securities, amounting in the whole to 1326*l.* 17*s.* 6*d.*, for doing which he made no charge, and on the other hand Mrs. Spooner from time to time made payments to the prisoner amounting in the whole to 1886*l.* 2*s.* 6*d.*, such payments not being made specifically against any particular items, but in cheques for round sums.

On the 12th of November, 1872, the prisoner made the following suggestion to Mrs. Spooner:—

11, Royal Exchange, London, E.C., Nov. 12, 1872.
Amended scheme of investment.

Argentine 6 per Cent.	price (say)	97	(2 bonds)	£194
Austrian Silver Rentes, 5 per Cent.....		67	(2).....	134
Chilian 6 per Cent.		103	(2).....	206
„ 7 per Cent.		108	(1).....	108
Japanese 9 per Cent.		111	(2).....	222
United States 5.20 6 per Cent.		93	(5).....	465

Producing 89*l.* per annum. £1829

Dear Madam,—The above is an amended scheme of investment, which I trust you will find in accordance with your wishes. No doubt it will be better to take advantage of present lower quotations wherever prices have been affected by late events, and I will proceed to act immediately on receiving your instructions to that effect—I remain, dear madam, yours truly,

Y. CHRISTIAN.

Mrs. Spooner.

Mrs. Spooner assented to this, and on the 14th of November, 1872, the prisoner purchased on her account, but in his own name, from one Wrenn, a jobber on the Stock Exchange, the three sets of securities mentioned in the contract note of the 14th of November, 1872, hereinafter set out, and sent to Mrs. Spooner the following letter and contract note:—

11, Royal Exchange, London, E.C., Nov. 14, 1872,

Dear Madam,—I have much pleasure in inclosing contract note for

200 <i>l.</i> Argentine 68	at 96
200 <i>l.</i> Austrian Silver	65½
2500 dols 5.20, 1867.....	93½

which I have every reason to believe will pay you very well, taking into consideration their stability. I hope to get the Japanese to-morrow. Railways (Great Northern, Great Western, and Caledonian) are all expected to give good dividends, and I think you will do well to procure a few. The markets are on the rise, in consequence of the Bank rate not having been altered.—I beg to remain, dear madam, your most obediently,

Y. CHRISTIAN.

Mrs. Spooner.

London, Nov. 14, 1872.

Sold to Mrs. Spooner,			£	s.	d.
200 <i>l.</i> Argentine 1868	at 96	net	192	0	0
200 <i>l.</i> Austrian Silver	at 65½	„	131	0	0
2500 dols. 5.20 1867.....	at 48½	„	525	18	9

Stock and Share Dealer,
11, Royal Exchange, E.C.
Bankers: Bank of England.

Rect.
Y. Christian
Stamp

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CHRISTIAN.
—
1878.
—
Agent—
Fraudulent
Conversion of
Money.

REG. The prices mentioned in this note were the same as those
v. agreed between the prisoner and the vendor of the bonds, &c.
CHRISTIAN. The prisoner did not disclose his principal, but said he was buying
1873. for a widow lady.
Agent— On the 15th of November, 1872, Mrs. Spooner sent to the
Fraudulent prisoner the following statement of account between herself and
Conversion of the prisoner :—
Money.

Statement of Accounts.

	£	s.	d.	£	s.	d.
Feb. 3, 200 <i>l</i> . New South Wales Government Stock at 104½ ...	209	5	0			
Feb. 3, 200 <i>l</i> . Victoria Six per Cent. Government Stock, at 114½	228	15	0			
April 10, 25 Western Gas (A. B., or C.), at 17½	443	15	0			
April 10, 7 Imperial Gas (12½ issue), 10 <i>l</i> . paid, at 4 premium...	98	0	0			
April 10, 8 Reuter's Tel. at 11½, and stamp fee	90	10	0			
April 17, 13 Imperial Gas (12½ issue), 10 <i>l</i> . paid, at 4 premium	182	0	0			
April 17, Stamp and fee	1	2	6			
April 17, Stamp and fee, 7 Imperial Gas, April 10	0	12	6			
April 17, Stamp and fee, 25 Western Gas, April 10.....	2	7	6			
April 22, 5 Imperial Gas, at 14	70	0	0			
April 22, Stamp and fee	0	10	0			
Nov. 14, 200 <i>l</i> . Argentine 1868, at 96	192	0	0			
Nov. 14, 200 <i>l</i> . Austrian Silver, at 65½	131	0	0			
Nov. 14, \$2500 5.20 1867, at 93½	525	18	9			
	£2175	16	3			
Feb. 3, By cheque				500	0	0
April 10, Ditto				600	0	0
April 11, Ditto				100	0	0
April 18, Ditto				186	2	6
April 28, Ditto				500	0	0
				1886	2	6
Balance.....				289	13	9
				£2175	16	3

accompanied by the following letter :—

2, Pemberton-terrace, St. John's Park, Nov. 15, 1872.
My dear Sir,—I inclose a statement of account, with a cheque for the balance, which I hope you will find correct. When I know the amount of the Japanese I will immediately forward you a cheque for the same. With my best thanks for all your kindness,—I am, yours faithfully,
Y. Christian, Esq. M. A. SPOONER.

and also by a cheque for 289*l*. 13*s*. 9*d*., payable to the prisoner or order ; and the prisoner on the 16th of November acknowledged the receipt of the cheque and account, and obtained payment of the former.

On the 27th of November, 1872, the prisoner wrote the following letter to Mrs. Spooner :—

Y. Christian,
Stock and Share Dealer.

Bankers :
Bank of England.

11, Royal Exchange,
London, E.C.
Nov. 27, 1872.

Dear Madam,—I inclose a contract note for 300*l*. Japanese Bonds at 112—836*l*. This 300*l*. was offered to me in one lot, and I thought myself fortunate in securing them for you, and had no doubt of your ratifying what I have done. These Japanese securities are really a first-rate investment, and will pay 8 per cent. I have got

them at the lowest price of the day, and, indeed, my apparent dilatoriness in the matter has been caused solely by my anxiety to get them cheaper if I could.—Yours truly,

Mrs. Spooner, &c.

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and inclosed in it the following contract note :—

London, Nov. 27, 1872.

Sold to Mrs. M. A. Spooner,
300*l*. Japanese at 112.

£386: 0: 0

Stock and Share Dealer,
11, Royal Exchange, E.C.
Bankers: Bank of England.

Rect.
Y. Christian
Stamp.

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The prisoner had on the same day bought in his own name from Mr. Wrenn three Japanese bonds at 112*l*.

It was not true that the 300*l*. was offered to the prisoner in one lot, but the prisoner asked Mr. Wrenn for three bonds.

On the same day Mrs. Spooner sent to the prisoner the following letter :—

2, Pemberton-terrace, St. John's Park, Nov. 27, 1872.

My dear Sir,—I have just received your note and contract note for 8 Japan shares, and inclose a cheque for 386*l*. in payment. I am much obliged to you, and perfectly satisfied that you have purchased the three shares for me. My son Frank will be the bearer of this, and I shall feel obliged if you will kindly give him any information you can about the Nicholas Railway and the "Share Investment Trust."—Again thanking you: in haste, believe me, yours faithfully.

M. A. SPOONER.

and also a cheque for 386*l*., payable to the prisoner or order, and the prisoner received and indorsed the cheque, and received the proceeds thereof.

On the 29th of November, 1872, the prisoner wrote the following letter to Mrs. Spooner :—

Y. Christian.
Stock and Share Dealer.
Bankers:
Bank of England.

11, Royal Exchange,
London, E.C.
Nov. 29, 1872.

Dear Madam,—I have to acknowledge the receipt of your cheque for 386*l*. value for three Japanese Bonds, which I shall have the pleasure to forward you immediately on their being delivered. I now inclose two 100*l*. Argentine Bonds of the Six per Cent. Loan of 1868, Nos. B 12,809 and 1572, and two bonds for 1000 florins each of the Austrian Currency Loan, Nos. 495,402 and 495,403. With reference to the latter portion of your note, I will at once say I do not recommend either the Nicolas Railway or the Share Investment Trust. But turning the matter over, I consider, for safety and profit, a sum laid out on Great Western or North London Railway shares will do good. For that purpose, however, we must watch the market, and take advantage of a day or week when prices have declined. But of course I shall do nothing till I have your sanction for proceeding.—Yours truly,

Mrs. Spooner, &c.

Y. CHRISTIAN.

Mrs. Spooner never received either the 2500 United States Bonds or the Japanese, though she repeatedly applied to the prisoner for them, and the prisoner on one occasion told her that the broker or jobber was in his debt, and that the broker or jobber knew that when he delivered the bonds the prisoner would deduct from the price the amount of such debt.

On the 8th of August, 1873, the prisoner offered Mrs. Spooner

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a composition, and informed her he was filing a petition for liquidation.

Ultimately the United States Bonds and the Japanese Bonds having been carried over from time to time, by order of the prisoner, without the knowledge of Mrs. Spooner, were sold by the orders of the prisoner.

The prisoner never paid the person from whom he bought the United States and Japanese Bonds for the same, and the cheques for 289*l.* 13*s.* 9*d.* and 336*l.* were paid into the prisoner's account, and the proceeds of such cheques applied by the prisoner to his own purposes.

At the close of the case for the prosecution, it was submitted, on behalf of the prisoner, that Mrs. Spooner's letter of the 27th of November, 1872, did not constitute a sufficient direction in writing to apply, pay, or deliver the cheque or its proceeds for any purpose, or to any person specified in such direction, within the meaning of the statute.

I left the case to the jury, but reserved the aforesaid question for the opinion of the Court of Criminal Appeal.

The jury found the prisoner guilty, and I admitted him to bail.

The question for the opinion of the Court of Criminal Appeal is, whether Mrs. Spooner's letter of the 27th of November, 1872, coupled with the prisoner's letter of that date, and the contract note for the Japanese Bonds, was under all the circumstances of the case a sufficient direction in writing within the statute.

(Signed)

GEORGE E. HONYMAN.

Metcalfe, Q.C. (*Collins* with him), for the prisoner.—There was no specific direction in writing to apply the cheque for 336*l.* to any particular purpose, as required by the Statute 24 & 25 Vict. c. 96, s. 75. The prisoner is described as a dealer in stock and shares, and it is found that he bought the Japanese bonds in his own name and contracted to sell them to the prosecutrix in his own name. [HONYMAN, J.—At the trial it was admitted that the prisoner acted as an agent for the prosecutrix, and it was never pretended that he sold to her on his own account.] The previous dealings between the prisoner and the prosecutrix also show that the prisoner was not acting as her agent, but on his own account. The bonds were sold to him, and he recommended them to her, and she sent her cheque to pay himself and not to invest the proceeds for her. The fair construction of the letter of the 27th of November is, that it was not a direction specifically to apply the cheque to the payment for the bonds, but to apply it to repay himself for money previously paid on her account, or against a liability he had incurred on her account. The case of *Rees v. Golde* (2 Moo. & Rob. 425) was cited. [POLLOCK, B.—That was an indictment for misapplying the security itself. LUSH, J.—And the words of the 7 & 8 Geo. 4, c. 29, were held not large enough to include the conversion of a security, but the present statute cures that difficulty.]

Mead, for the prosecution, was not called upon to argue.

KELLY, C.B.—The statute upon which the prisoner is indicted makes it a misdemeanor for any banker or other agent entrusted with money, or any security for the payment of money, who having received any direction in writing to apply such money or security, or the proceeds of such security, for any purpose, shall, contrary to the terms of such direction, convert to his own use or benefit such money, security, or the proceeds thereof. And the question is, whether the direction to the prisoner contained in the letter of the prosecutrix of the 27th of November is a direction within the meaning of the statute, and what is its real meaning. There is no precise statement in the letter as to what purpose the cheque was to be applied. Now it appears that the prisoner had been in the habit of purchasing securities for the prosecutrix and of receiving cheques in payment from her. It is not very material whether he purchased them in his own name or not. He says in his letter of the 27th of November what turned out to be untrue, that this 300*l.* of Japanese bonds was offered to him in one lot, and that he thought himself fortunate in securing them for the prosecutrix. That letter is some evidence that the prisoner acted fraudulently. The words of that letter are open words and it inclosed a contract with the prosecutrix in his own name. That contract note and the letter in which it was contained are no doubt ambiguous, and it might be contended that the import was that he had actually purchased the bonds in his own name, and that he had received them, and that nothing remained to be done but to deliver them over and for her to send her cheque on account of them. If that were so, the construction of the prosecutrix's letter of the 27th of November would be, "Whereas, you have purchased bonds and are about to deliver them to me, now to enable you to do so I send you a cheque." If that were the construction, then there would be nothing in this case in contravention of the statute. But it may also be contended that the construction of the letter is that he had purchased the bonds for her in his own name for 336*l.*, but that they had not been delivered, and that in order to get them delivered he would have to pay that amount; and, if so, the prosecutrix's letter in reply would mean this, "Whereas you have purchased the bonds in your own name and have not paid for them; and whereas you have purchased them for me, I send you a cheque which you will please to pay over to the person who has sold them, that he may deliver them." That construction of the letter would amount to a direction within the meaning of the statute. As either meaning may be attached to the letter, it may be read as containing a direction in the alternative, "Whereas you have purchased by my instructions these bonds, and you do not tell me whether you have paid for them or not, I enclose you a cheque to repay yourself, if you have paid for them; but if you have not, and have still to pay for them, be good enough to apply the cheque in payment thereof." Reading the letter of the prosecutrix so, it operates as a direction to the

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prisoner, who knew the facts, to apply the cheque to the payment of the seller of the bonds, in order to obtain possession of them for her. I therefore think the conviction should be affirmed.

BLACKBURN, J.—I also think that the conviction should be affirmed. At first I supposed it was disputed on the facts whether the prisoner acted as an agent for the prosecutrix, but it is admitted that he did in some way so act. The prisoner then, being her agent, acts for the prosecutrix as her agent to buy stocks and shares for her and buys various securities by her directions. It may well be that he was acting as her agent in so buying, although without establishing privity between her and the sellers of the stocks and shares, *Mollett v. Robinson* (41 L. J. C. P. 65); for in cases in which he made himself liable to the persons from whom he bought he would have the right to call on her to pay him. Now his letter of the 27th of November, incloses a contract for 300*l.* Japanese, and expresses it as “Sold to Mrs. Spooner by himself;” and it is probable, therefore, that he had made himself personally liable to the seller. But that does not show that he was not acting as her agent. In many cases a broker makes himself personally liable to both sides and yet is still an agent. In this case the defendant notified to the prosecutrix that he had bought the bonds and secured them for her, and he had no doubt she would ratify what he had done, and inclosed the sold note for 336*l.*, and upon that the prosecutrix wrote the letter in reply. The question is, what is the meaning of her letter? I have no doubt that it means, “Inasmuch as the sum of 336*l.*, is to be paid before I can get the bonds, here is my cheque, get the proceeds and with them take up the bonds in the most convenient way.” If he had honestly paid the cheque into his bankers, all would have been right and proper, and although some unfortunate occurrence might have prevented his applying it as directed, it would not have been in violation of good faith. The prosecutrix’s letter amounts to a direction to apply the proceeds of the cheque for a particular object, viz., the taking up of the Japanese bonds, so as to leave the prosecutrix free from all claim. Was that a direction within the statute? I think it was, for the defendant, an agent of some sort as a broker, bought the bonds and wrote that he had secured them for the prosecutrix, and she sent her cheque with a written direction to take them up with the proceeds of the cheque. The question was left to the jury, whether the prisoner applied the proceeds of the cheque in violation of good faith and contrary to the purpose for which he received it and they found that he did. The conviction must therefore be affirmed.

LUSH, J.—The only question reserved for this court is, whether Mrs. Spooner’s letter of the 27th Nov., coupled with the prisoner’s letter of that date and the contract note for the Japanese bonds, was a sufficient direction within the meaning of the statute. The question of *mala fides* is not open, and it must be taken as a fact by us that the conversion of the proceeds of the cheque was

such as to make the defendant criminally liable, if it was contrary to a sufficient direction within the meaning of the statute. It seems to me that the question is free from much doubt. The prisoner's letter is in substance, "I have bought for you three Japanese bonds and inclose the contract note for 336*l*." Her letter in reply clearly means, "If you have not paid for them, apply the proceeds of the cheque in payment of them; if you have, apply them in repaying yourself." This was a quite sufficient direction within the statute.

POLLOCK, B.—I am of the same opinion.

HONYMAN, J.—No point was raised at the trial as to the agency. The defendant was a gratuitous agent, buying shares, &c., for the prosecutrix in his own name. The question depends on the meaning of the word "payment," in the prosecutrix's letter of the 27th Nov. It means that if the defendant had paid for the bonds he was to put the proceeds of the cheque into his own pocket; and if he had not paid for them, he was to pay for them with the proceeds of the cheque, and deliver the bonds to her. The letter comes to that and is therefore a written direction within the statute.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN and LUSH, JJ., POLLOCK, B.,
and HONYMAN, J.)

REG. v. TWIST. (a)

Larceny—Indictment—Corpus delicti.

*Prosecutor bought a horse, and was entitled to the return of 10*s*. chap money out of the purchase money. Prosecutor afterwards, on the same day, met the seller, the prisoner, and others together in company and asked the seller for the 10*s*., but he said he had no change, and offered a sovereign to the prosecutor, who could not change it. The prosecutor asked whether anyone present could give change. The prisoner said he could, but would not give*

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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it to the seller of the horse, but would give it to the prosecutor, and produced two half-sovereigns. The prosecutor then offered a sovereign of his own with one hand to the prisoner, and held out the other hand for the change. The prisoner took the sovereign and put one half-sovereign only into the prosecutor's hand, and slipped the other into the hand of the seller, who refused to give it to the prosecutor and ran off with it.

Held, that the indictment rightly charged the prisoner with stealing a sovereign.

CASE stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

Samuel Twist was tried before me at the last sessions on an indictment charging him with stealing one sovereign, and money to the amount of one pound from the prosecutor, Richard Pearson.

The facts proved were as follows: The prosecutor purchased a horse at Winchcomb Fair, on the 28th July last, from a person whose name did not appear, for 28*l.*, out of which he was to receive, but did not at the time receive, ten shillings by way of chap money. The prisoner was not present at the sale.

Afterwards, on the same day, the prosecutor was taking the horse to Evesham, when a party with horses, among whom were the prisoner and the person who sold the horse, overtook him, and on arriving at Evesham he was surrounded and pushed about by the same party, who tried to persuade him to resell the horse, which turned out to be broken-winded, for 10*l.* This the prosecutor refused to do, saying he would abide by the loss, and he then asked the person who had sold him the horse for the ten shillings chap money; and that person then said he had no change by him, and offered the prosecutor a sovereign, but the prosecutor could not give change, as he had nothing but sovereigns with him.

The prosecutor then asked whether anyone present could give the change. The prisoner said he could, but that he would not give it to the person who had sold the horse, but would give it to the prosecutor, and he held out two half-sovereigns towards the prosecutor in the palm of his hand. The prosecutor thereupon took a sovereign out of his pocket, and offered it to the prisoner with one hand, and at the same time held out his other hand for the change. The prisoner took the sovereign so offered to him by the prosecutor, and put one of his half-sovereigns only into the prosecutor's hand held out to receive the change, and slipped the other half-sovereign into the hand of the person who had sold the horse, and that person thereupon stepped back, and, though asked, refused to give it to the prosecutor.

The prosecutor immediately fetched a policeman, who took the prisoner into custody, but the person who had sold the horse had disappeared, and has not since been heard of. The prisoner on being charged by the policeman stated, contrary to the fact, that he had given both the half-sovereigns to the prosecutor. The

prosecutor would not have given his sovereign to the prisoner, unless he had expected to receive both the half-sovereigns shown to him by the prisoner in exchange.

Upon these facts I directed the jury that if they were of opinion that the prisoner at the time when he took the sovereign offered to him for change intended to defraud the prosecutor of the whole or any part thereof, and in pursuance of such intention fraudulently withheld from the prosecutor one of the half-sovereigns in the manner stated in the evidence, they might properly find him guilty, but if otherwise, they ought to acquit.

The jury returned a verdict of guilty, and the prisoner was sentenced to four months imprisonment with hard labour.

In the course of the trial it was objected by the counsel for the prisoner that on the above facts, even assuming them to be proved, the prisoner could not be legally convicted of the offence charged in the indictment. I overruled the objection, but reserved the point, and in the meantime respited execution of the judgment, and admitted the prisoner to bail.

The question on which I respectfully desire the opinion of the Court is: Whether under the circumstances above stated the prisoner was properly convicted of larceny?

(Signed) R. PAUL AMPHLETT,
Chairman of the above Court of Quarter Sessions.

No counsel appeared for the prisoner.

Jelf for the prosecution.

KELLY, C.B.—In this case the prosecutor never parted with the possession of the sovereign, and never intended to part with it, unless the two half-sovereigns were given to him in exchange. The conviction must be affirmed.

Conviction affirmed.

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COURT OF CRIMINAL APPEAL.

Saturday, Nov. 22, 1873.

(Before KELLY, C.B., BLACKBURN, LUSH, and GROVE, JJ., and
POLLOCK, B.)

REG. v. ADEN(a).

Larceny—Bailee.

The prisoner was frequently employed by the prosecutor to fetch coals from C. Before each journey the prosecutor made up to the prisoner 24l., out of which he was to pay for the coals, keep 23s. for himself, and if the price of the coal, with the 23s., did not amount to 24l., to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal, as he obtained it, with the money received from the prosecutor; and the prosecutor did not know but that he did so; but provided he was supplied with the coal, and not required to pay more than the proper price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th March the prisoner had a balance of 3l. in hand and the prosecutor gave him 21l. to make up 24l. for the next journey. The prisoner did not then buy any coal, but fraudulently appropriated the money :

Held, that a conviction of the prisoner for larceny of the 21l. as a bailee was right.

CASE stated for the opinion of the Court by the Chairman of the Wolverhampton Quarter Sessions.

At the quarter sessions of the peace held at Wolverhampton, on the 22nd of May, 1873, Thomas Aden was tried for larceny.

The first count of the indictment charged that the prisoner, being a servant to William Bellis, feloniously stole 21l., the property of his master; the second count charged him with simple larceny.

The prosecutor was a coal merchant, and was possessed of a boat. The prisoner was possessed of a horse, and had for several years been employed by the prosecutor to fetch coal three or four times each week, in the prosecutor's boat, drawn along a canal by the prisoner's horse, from the Cannock Chase Colliery to Wolverhampton. There was no agreement between them as to the period of employment, and either might have terminated

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

it at the end of any journey. Occasionally, but rarely, the prisoner, when not so employed by the prosecutor, drew boats under similar circumstances for other persons. Before each journey the prosecutor gave or made up to the prisoner the sum of 24*l.*, out of which he was to pay for the boat load of coal, and to keep 23*s.* for himself as payment for his services and the use of his horse. If the quantity of coal with the 23*s.* did not amount to 24*l.*, the balance was kept in hand by the prisoner, and a sum less than 24*l.* by the amount of that balance was given to him for the next journey. The colliery company knew that the prisoner did not buy the coal on his own account, but they sometimes let him have a boat load without paying for it at the time, or upon his paying only a portion of the price; and on such occasions they regarded the prisoner as their sole debtor. It was the prisoner's duty to pay for each load of coal as he obtained it, with the money he received from the prosecutor, and the prosecutor did not know but that he did so; and provided he was supplied with the proper quantity of coal, and not required to pay more than the proper price for it, it was quite immaterial to the prosecutor in what manner the prisoner paid for it.

On the 20th of March, 1873, the prisoner had, or ought to have had, in hand a balance of 3*l.* in respect of the previous journey, and on that day he received in the usual manner 21*l.* in gold from the prosecutor, to make up 24*l.* for the next journey. The prisoner did not buy any coal or bring any to the prosecutor for this money, but fraudulently appropriated the 21*l.*, and falsely pretended that he had been robbed of it on the canal bank as he was going to fetch the coal. It appeared, however, that after receiving the 21*l.*, the prisoner paid to the Colliery Company the sum of 12*l.* 9*s.* 9*d.*, being a balance due to them upon a previous load of coal, for which he had previously received the money from the prosecutor.

Upon these facts, it was contended by the prisoner's counsel, that the prisoner could not be convicted on the first count, because he was not a servant of the prosecutor; nor upon the second count, because he was not the bailee of any money that was specifically to be held for or returned to the prosecutor. The case of *Reg. v. Davis* (10 Cox C. C. 239), was relied upon for the prosecution; and the case of *Reg. v. Hassall* (30 L. J. 175, M. C.; 8 Cox. C. C. 491), for the defence.

The jury found the prisoner guilty of fraudulently appropriating the money, whereupon I respited the sentence, and at the request of the prisoner's counsel, pray the judgment of the Court for Crown Cases Reserved whether, upon the facts above stated, the prisoner can be lawfully convicted upon either count of the indictment.

(Signed) JOHN J. POWELL.

No counsel appeared on either side.

KELLY, C.B.—In this case, a sum of money was placed in the

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hands of a boatman for the purpose of purchasing coals for the prosecutor from a colliery company, which coals the prisoner was to pay for with the money so placed in his hands by the prosecutor. The prisoner did not buy any coals, but paid away part of the money in satisfaction of a debt owing by him to the Colliery Company, and failed to procure the coals. This was a clear case of larceny of money entrusted to the prisoner as a bailee, within 24 & 25 Vict. c. 96, s. 3.

Conviction affirmed.

COURT OF CRIMINAL APPEAL.

Saturday, Nov. 22, 1873.

(Before KELLY, C.B., BLACKBURN, LUSH, and GROVE, JJ., and
POLLOCK, B.)

REG. v. DAYNES and WARNER. (a)

*Larceny—Bailee—Offence punishable summarily—13 Geo. 2, c. 8
—24 & 25 Vict. c. 96, s. 3.*

The prosecutors (boot and shoe manufacturers) gave out to their workmen leather and materials to be worked up, which were entered in the men's books and charged to their debit. The men might either take them to their own homes to work up, or work them up upon the prosecutor's premises; but in the latter case they paid for the seats provided for them. When the work was done, they received a receipt for the delivery of the leather and materials, and payment for the work. If the leather and materials were not redelivered, they were required to be paid for. The prisoner Daynes was in the prosecutor's employ, and received materials for twelve pairs of boots; he did some work upon them, but instead of returning them, sold them to the prisoner Warner. These materials were entered in the prosecutor's books to Daynes' debit, but omitted by mistake to be entered in Daynes' book. Held, that Daynes could not be convicted of larceny as a bailee,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

under 24 & 25 Vict. c. 96, s. 3, as the offence of which he had been guilty was punishable summarily under 13 Geo. 2, c. 8. Quære, whether the transaction, as between the prosecutor and his men, did not amount to a sale of the leather and materials?

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CASE reserved for the opinion of this Court by the Recorder of Ipswich:

*Larceny by
Bailee—
Evidence.*

Richard Daynes and Samuel Warner were tried before me, at the quarter sessions holden for the borough of Ipswich, on the 3rd July, 1873, upon an indictment which charged the former, as a bailee, with stealing, and the latter with receiving, a quantity of boots and leather.

Messrs. Clarke and Co., the alleged owners of the property, and the prosecutors, were boot and shoe manufacturers. They employed a large number of workmen, amongst others the prisoner Daynes.

The mode of employment was as follows:—The foreman of the department gave out to each of the men a quantity of leather and other materials, which were respectively entered in the man's book and charged at a fixed price to his debit. The workman then did his proposed work upon them, and afterwards took them back to the foreman, and received from him a receipt in his book for the delivery, and payment for the work so done. If the materials in their original or improved state were not so re-delivered, the man was required to pay for the materials. A similar entry out and in was also made in the books of the firm.

The prisoner Daynes was a nailer. He, on the 8th of February 1873, received from the foreman materials for twelve pairs of boots. He did some work upon them, but instead of returning them to the foreman, sold them to Warner, in whose possession they were found under circumstances which showed his complicity. These materials for the twelve pairs of boots were by mistake not entered in Daynes' book, but they were entered in the books of the firm to Daynes' debit, as in other cases.

It was further proved that Daynes, when he so received materials, might either take them to his own home to work up, or might work them up upon the premises of the firm; but if he elected the latter course, he was required to pay for the seat provided for him upon the premises; and such sum was stopped out of the payments for the work.

He was not paid wages, nor was he, except as herein mentioned, in the employ of the firm.

Daynes, in February, was working upon the premises of the firm, and worked up the materials in question at a seat so provided and paid for, such payments for the seat being entered in his book as "stopped." Shortly after the 8th of February he worked at his own home, which he did without any notice to the firm being given or required, and without any alteration being made in his book; and it was proved that there was no difference

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made between the men who worked on and those who worked off the premises. The men paid for their books.

The counsel for the prosecution contended that the prisoners were liable to be convicted under chap. 96, sect. 3, of the Criminal Law Consolidation Act (24 & 25 Vict.) which is in these words:—"Whosoever being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny; and may be convicted thereof upon an indictment for larceny, but this section shall not extend to any offence punishable on summary conviction."

The counsel for the prisoners contended that the conviction was precluded by the concluding words of that section; for that under 13 Geo. 2, c. 8, Daynes was liable to be dealt with summarily for the misappropriation of these materials, and that if there was no stealing to warrant an indictment, there could be no such receiving.

The part of the section is as follows:—"And whereas many frauds and abuses have of late been otherwise committed by persons employed in cutting out and manufacturing of skins, leather, and other materials, into gloves, breeches, boots, shoes, slippers, &c. Be it enacted, that if any person or persons, hired or employed, or to be hired or employed in cutting, paring, washing, dressing, sewing, making up, or otherwise manufacturing of gloves, breeches, leather skins, boots, shoes, slippers, wares, or other goods or materials to be made use of in any of the trades or employments, or in manner last-mentioned, or in any branch or particular thereof, shall fraudulently purloin, embezzle, secrete, sell, pawn, or exchange, all or any part of the gloves, breeches, leather, skins, parings, or shreds of gloves or leather, or other materials with which he, she, or they, shall be intrusted to work up or manufacture, or shall purloin, embezzle, secrete, sell, pawn, or exchange, any gloves, breeches, boots, shoes, slippers, or wares, when made, wrought up or manufactured, and be thereof lawfully convicted," the justices are to award a suitable recompense, and with power of imprisonment in case of non-payment. Sect. 5 applies to receivers of such property. The 6 & 7 Vict. c. 40, repeals part of this Act, but not the provisions aforesaid—and 22 Geo. 2, c. 27 (ss. 1 and 2) provides further for punishment upon such conviction.

I thought the objection fatal, but the matter being one of frequent occurrence, I consented to leave the facts to the jury, and to take the opinion of this Court. The jury found both prisoners guilty.

The court is requested to say whether the conviction can be sustained or not.

(Signed) WILLIAM JAMES METCALFE,
Recorder.

No counsel appeared on either side.

KELLY, C.B.—After stating the leading facts, proceeded: In this case it might have been contended that the transaction was really a sale of the leather to the prisoner Daynes, and that the property in it passed to him; but that question does not now arise, and need not be determined, because the prisoner was indicted under the 24 & 25 Vict. c. 96, s. 3, which section concludes with these words, “but this section shall not extend to any offence punishable upon summary conviction.” Now the present case is completely within the 13 Geo. 2, c. 8, and may be dealt with summarily, and, consequently, is within the proviso in sect. 3 of 24 & 25 Vict. c. 96. Under these circumstances the conviction must be quashed.

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*Larceny by
Bailee—
Evidence.*

Conviction quashed.

COURT OF CRIMINAL APPEAL.

Saturday, Nov. 22, 1873.

(Before KELLY, C.B., BLACKBURN, LUSH, and GROVE, JJ., and
POLLOCK, B.)

REG. v. COGGINS. (a).

Larceny—Receiving—Accessory in the second degree.

An indictment charged S. with stealing 18s. 6d., and C. with receiving the same. The facts were: S. was a barman at a refreshment bar, and C. went up to the bar, called for refreshments and put down a florin. S. served C., took up the florin, and took from his employer's till some money, and gave C. as his change 18s. 6d., which C. put in his pocket and went away with it. On leaving the place he took some silver from his pocket and was counting it when he was arrested. On entering the bar signs of recognition took place between S. and C., and C. was present when S. took the money from the till. The jury convicted S. of stealing and C. of receiving.

Held, that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which C. might have been convicted as a principal in the second degree; and that therefore the conviction of C. for receiving could not be sustained.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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CASE reserved for the opinion of this Court by the Recorder of Brighton.

The prisoner was tried before me at the last sessions for the borough of Brighton on a charge of receiving from one Frederick Silvey the sum of 18s. 6d. the property of the prosecutor, John Buteux Mellison, well-knowing the same to have been stolen, Frederick Silvey being at the same time tried on the charge of stealing the said 18s. 6d.

Frederick Silvey was employed by the prosecutor, John Buteux Mellison, to act as barman at a refreshment bar under the grand stand on the Brighton Race Course during the Brighton race meeting. While the said Frederick Silvey was so employed, the prisoner Coggins went up to the bar at which the said Frederick Silvey was serving, and after calling for a cigar and some lemonade and brandy, put down a florin. Frederick Silvey served the prisoner Coggins with a cigar and some lemonade and brandy, took up the florin, and after going to the prosecutor's till, took some money out of the said till, and gave to the prisoner as his change the sum of 18s. 6d. The prisoner placed the 18s. 6d. in his pocket, and after moving away from the bar was followed by a detective, who saw him take a quantity of silver out of his pocket and proceed to count it, whereupon he was arrested.

On the prisoner, Charles Coggins, entering the bar, signs of recognition took place between him and the prisoner Silvey; and the prisoner, Charles Coggins, was present at the time when the prisoner Silvey took the sum of 18s. 6d. from the till of the prosecutor.

The jury found the prisoner, Frederick Silvey, guilty of stealing the said sum of 18s. 6d., and the prisoner, Charles Coggins, guilty of receiving the said sum knowing it to have been stolen.

The counsel for the prisoner, Charles Coggins, thereupon moved in arrest of judgment on the ground that on the facts disclosed, the said Charles Coggins was guilty of stealing the said sum of 18s. 6d., and could not be guilty of receiving it knowing it to have been stolen.

I arrested the judgment of the court accordingly, and I now desire the opinion of this Court whether on the evidence above stated the prisoner, Charles Coggins, can be lawfully convicted of receiving the said money knowing it to have been stolen.

(Signed)

JOHN LOCKE.

SECOND CASE.

THE prisoner was tried on a charge of receiving from one George Loder the sum of 9s. 6d., the property of the prosecutor, John Buteux Mellison, well knowing the same to have been stolen, the said George Loder being at the same time indicted for feloniously stealing the said sum of 9s. 6d., he being then the servant of the said John Buteux Mellison.

George Loder was employed by the prosecutor, John Buteux

Mellison, to act as barman at a refreshment bar under the grand stand on the Brighton Race Course during the Brighton race meeting. While the said George Loder was so employed, the prisoner, Coggins, went up to the bar at which the said George Loder was serving, and after calling for a sandwich put down a shilling. George Loder served the prisoner Coggins with a sandwich, took up the shilling, and after going to the prosecutor's till, took some money out of the said till and gave to the prisoner as his change the sum of 9s. 6d. The prisoner placed the 9s. 6d. in his pocket, and after moving away from the bar was followed by a detective, who saw him take a quantity of silver out of his pocket and proceed to count it, whereupon he was arrested.

The prisoner, Charles Coggins, was talking to the prisoner, George Loder, before he called for the sandwich, and was present at the time when the prisoner, George Loder, took the said sum of 9s. 6d. from the till of the prosecutor.

The jury found the prisoner, George Loder, guilty of stealing the said sum of 9s. 6d., and the prisoner, Charles Coggins, guilty of receiving the said sum knowing it to have been stolen.

The counsel for the prisoner, Charles Coggins, thereupon moved in arrest of judgment on the ground that on the facts disclosed, the said Charles Coggins was guilty of stealing the said sum of 9s. 6d., and could not be convicted of receiving the said money knowing it to have been stolen.

I arrested the judgment of the court accordingly, and I now desire the opinion of this Court whether on the evidence above stated, the prisoner, Charles Coggins, can be lawfully convicted of receiving the said money knowing it to have been stolen.

(Signed)

JOHN LOCKE.

Besley for the prisoner.—The conviction cannot be sustained.

Grantham for the prosecution objected that the objection was not properly taken by motion in arrest of judgment.

The COURT said it must be taken that the point intended to be reserved was whether there was any evidence to go to the jury in support of the conviction.

Besley.—It is clear upon the authorities that a person cannot be a principal in the second degree, and also a receiver of the stolen property. From *Dyer's case* (2 East, P. C. 767), it appears that if a person takes part in the transaction while the act of larceny by others is continuing, he will be guilty as a principal in the larceny and not as a receiver. In this case it was a continuing transaction so as to make the prisoner Coggins a party to the theft, although, as regards the barman, the theft was complete as soon as the money was removed from the till, *animo furandi*. [BLACKBURN, J. —*Dyer's case* no doubt assists you so far that it shows that, upon the evidence here, Coggins might properly be found guilty as a thief.] Then, if so, he could not be convicted as a receiver. In *Rea v. Owen* (1 Mood. C. C. 96), where a man committed larceny in a room of a house, in which room he lodged, and threw a

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bundle containing the stolen property out of the window to an accomplice waiting in the street to receive it, the Judges held that the accomplice was a principal, and that the conviction of him as a receiver was wrong. So in *Reg. v. Perkins* (1 Den. & P. 459; 5 Cox C. C. 554), where A. was indicted for stealing pork, and B. for receiving the same, it appeared that they went together to the premises of A.'s employer, where the pork was kept, and that A. took the pork out of a tub where it was kept and brought it outside and gave it to B. Lord Campbell, C.J. there said: "Assuming, as we are bound to do from the case submitted to us, that the prisoner was a principal in the second degree, he could not take the stolen property from himself." And Alderson, B.: "If one burglar stands outside while another plunders the house and hands out the goods to him, he surely could not be indicted as a receiver." And Maule, J.: "My brother Adams seems to have intended to ask us, whether in a case where the prisoner was, in a popular sense, guilty of receiving, he might be treated as a receiver notwithstanding the fact that he was a principal in the theft; and it is clear that he cannot." [GROVE, J.—The case of *Reg. v. M'Evin* (1 Bell C. C. 25), seems very like this. The prisoner was charged in two counts with stealing and receiving, and this court held that the jury might return a verdict of guilty on the latter count if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing.] In that case, Pollock, C.B., remarked that in *Reg. v. Perkins*, it was stated as a fact that the prisoner was a principal. The jury negatived that in *Reg. v. M'Evin*.

Grantham, for the prosecution.—The conviction may be upheld on the authority of *Reg. v. M'Evin*. In that case the facts were that a woman was walking beside the prosecutrix, and the prisoner, M'Evin, was seen just previously following behind her. The prosecutrix felt a tug at her pocket, found her purse was gone, and on, looking round, saw the woman behind her walking with M'Evin in the opposite direction, and saw her hand something to M'Evin. And there the jury found M'Evin not guilty of stealing, but guilty of receiving. In the present case there was no evidence of any preconceived plan between Coggins and the barmen.

Besley, in reply.—The prisoner Coggins was aiding and abetting in the larceny from the moment of passing the florin over the counter.

The Court retired to consider its decision.

KELLY, C.B.—The majority of the court are of opinion that the conviction cannot be sustained. I and my brother Grove take a different view, but not so strong as to amount to dissent from the judgment of the majority.

BLACKBURN, J.—It is not necessary that this case should be argued before all the Judges, because the doubts of the Lord Chief Baron and my brother Grove do not amount to an actual

dissent from the judgment of the majority of the court. The question which was reserved for our opinion, as we consider, was whether or not there was evidence such as the Judge ought to have left to the jury as reasonable evidence on which they might have convicted the prisoner as a receiver. Unfortunately in this case there is the technical principle that a person assisting in the stealing is a principal in the first or second degree, and that a receiver must be a person who is not a principal felon. Had the question been left to the jury, whether or no from the time the prisoner laid down the florin, after which the barman took the 18s. 6d. from the till and gave it to him, he was aiding and abetting the barman in the commission of the larceny, I think the jury could not but have found that he was aiding and abetting. It might possibly be that he was aiding to carry away the money that had been stolen without his previous knowledge. But what we understand from the case to be the point, is, was there such evidence as it was the duty of the Judge to leave to the jury, as reasonable evidence upon which they might convict the prisoner of receiving? In point of strict law the prisoner should have been indicted for the offence which he really committed. As the matter stands the majority of the court think that the evidence was not such as the Judge ought to have left to the jury as reasonable evidence upon which the prisoner might be convicted of receiving. In *Reg. v. M'Evin*, the circumstances were different. The indictment contained counts both for stealing and receiving, and the judge properly left it to the jury, "That if they did not think that M'Evin was participating in the actual theft, it was open to them, on the facts, to find a verdict of guilty on the count for receiving." That was a proper direction, and the jury found a verdict of guilty on the count for receiving. There was evidence in that case on which the jury might have found either way. Here there was only one count against the prisoner, that for receiving, and the majority of the Court think there was not sufficient evidence to sustain the verdict.

LUSH, J., and POLLOCK, B., concurred.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN, J., LUSH, J., POLLOCK, B.,
and HONYMAN, J.)

REG. v. KITCHENER.

*County bridge—Damage thereto by locomotive—Repair—24 & 25
Vict. c. 70.*

The Locomotive Act (24 & 25 Vict. c. 70, s. 7) enacts that where any bridge on a turnpike or other road, carried across any stream, watercourse, or navigable river, canal, or railway, shall be damaged by reason of any locomotive passing over the same, or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in, or having charge of, such navigable river, canal, or railway, or of such bridge, shall be liable to repair the damage, &c., but the same shall be repaired to the satisfaction of such proprietors, &c., by the owners or persons having charge of the locomotive at the time of the happening of the damage :

Held, that this provision does not apply to bridges repairable by the inhabitants of a county.

CASE reserved for the opinion of this Court by Cleasby, B.

This case was tried before me at the Bedford Summer Assizes.

The defendant was indicted for the non-repair of a highway which had become impassable by reason of the breaking in of a bridge over which it passed, and which it was alleged the defendant was bound to make good by virtue of the 7th section of the 24 & 25 Vict. c. 70.

The indictment alleged that the highway was a highway for passengers, carriages, and locomotives, and was carried over a watercourse by means of a bridge, and that the bridge and the walls and supports thereof were broken by means of a locomotive of the defendant passing over, and coming in contact with the same, and that the defendant, though requested to do so, and though a reasonable time had elapsed, had not repaired the damage done to the bridge, and so the highway could not be used by the public with safety.

It was proved or admitted at the trial that there was a high-

way for passengers, carts, and carriages, leading from Biggleswade to Broom, in the county of Bedford, and that it passed over a stream or watercourse called Rook's-hole, by means of a bridge, which was sufficiently strong for ordinary traffic.

That the defendant was the owner of the locomotive traction engine, weighing about ten tons, and that on the 11th Feb., the engine, in passing over the bridge, broke in the part over which it passed, and fell through into the water, and that in consequence the highway became unsafe for ordinary traffic.

That the bridge was formed of iron girders fastened in brick-work on each side, and was repairable by the county.

That one of the outside girders was cracked and defective, and that the attention of the county surveyor had been called to this two years ago, but nothing was done to repair it, because the bridge was safe for ordinary traffic, and the defective girder was an outside one, and that traffic was not immediately over it, and the surveyor did not know that the road was used by traction engines.

That the bridge was broken in at the middle, and it did not appear that the breaking in was attributable to the defective girder.

That no notice had been put up to prevent the road being used by locomotives, and that the locomotive of the defendant complied with the requirements of the stat. 28 & 29 Vict. c. 83.

That the defendant had been requested to repair the bridge and road, and that a sufficient time for doing so had elapsed.

It was contended, on behalf of the defendant, that he could not be convicted—First, because the facts do not show an indictable offence; secondly, because no notice had been given under the statute to prevent the roads being used by locomotives; thirdly, because no injury was done to the bridge by the locomotive striking against the piers, or any other part of it, or any damage by the mode of propelling it; fourthly, because as the locomotive was lawfully using the road, and the bridge broken in from its weakness to support it, the bridge could not properly be said to be damaged by the use of the locomotive, but by reason of its own unfitness.

I overruled all the objections, and directed the jury that if the road and bridge were in a fit state for ordinary traffic a person using a locomotive upon it did so at his own peril, and if the bridge was broken in from being unable to bear the weight of the locomotive passing over it, the defendant was responsible.

The jury found the prisoner guilty, and he was let out on bail, and the judgment respited.

If my direction was wrong the conviction is to be quashed; if otherwise, to stand.

(Signed)

A. CLEASBY.

Merewether for the defendant.—The question turns on the construction of the 24 & 25 Vict. c. 70, s. 7, which enacts that,

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“Where any turnpike or other roads upon which locomotives may be used shall be carried over or across any stream or water-course, navigable river, canal, or railway, by means of any bridge or arch, and such bridge or arch, or any of the walls, buttresses, or supports thereof, shall be damaged by any locomotive, &c., passing over the same, or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in or having the charge of such navigable river, canal, or railway, or the tolls thereof, or of such bridge or arch, shall be liable to repair or make good any damage so occasioned; . . . but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons aforesaid interested in or having the charge of such river, canal, or railway, or the tolls thereof, or of such bridge or arch, by and at the expense of the owner or owners, or the person or persons having the charge of such locomotive at the time of the happening of such damage,” &c. Now, it is contended that this bridge being repairable by the county, does not fall within the above enactment. There are no words in sect. 7 applicable to a county bridge, nor is the county surveyor mentioned in it; while in the previous section 6 the surveyor may prohibit the use of a bridge by locomotives. In sect. 7, the repairs of the damage done by locomotives are to be done to the satisfaction of the proprietors, undertakers, directors, &c., not mentioning the surveyor. Sect. 7 applies to bridges which a body of persons interested in some undertaking have to make and keep in repair, and not to ordinary county bridges. Then, again, the 43 & 44 Geo. 3, c. 59, s. 4, enables the inhabitants of counties to sue for damages done to bridges made and repaired at the county’s expense in the name of the surveyor.

Graham for the prosecution.—At the time the 24 & 25 Vict. c. 74, passed, the law upon this subject stood thus: It was a nuisance to the highway by the common law if a carrier carried an unreasonable weight upon it, with an unusual number of horses: (Com. Dig. Chimin, A, 3.) Also in 3 Salk, 183, it appears that upon an information against a common carrier, setting forth that no waggon ought to carry more than 2000lb. weight, and that the defendant used a waggon with four wheels *et cum inusitatato numero equorum*, in which he carried 3000lb. or 4000lb. weight at one time, by which he spoiled the highway, it was held to be a nuisance because of the excessive weights carried. It was unlawful, therefore, to carry an excessive and unusual load upon a highway, when the Act passed. The preamble of the 24 & 25 Vict. c. 70, and also sect. 7, refers to turnpike and other roads carried over any stream, by any bridge or arch, and draws no distinction between county and other bridges. [POLLOCK, B.—The proprietors and other persons mentioned in sect. 7 have no means of preventing locomotives passing over the turnpike and other roads as the surveyor has under sect. 6 in the case of suspension and other bridges.] The

words of sect. 7 are sufficiently general to apply to county bridges? If they do not so apply, will sect. 7 apply to bridges repaired by persons liable *ratione tenuræ*? The prosecutors are within the words, "or other persons having charge of such bridge," in sect. 7 (1 Burns Just. 515: title "Bridges.")

KELLY, C.B.—I am of opinion that this conviction cannot be sustained. This was not a bridge within the meaning of sect. 7, and the inhabitants of a county do not come within the description therein of "persons interested in or having the charge of such bridge." With respect to county bridges, the provisions in ss. 6 and 13 of the 24 & 25 Vict. c. 70, and 43 & 44 Geo. 3, c. 59, s. 4, are sufficient to protect the inhabitants of a county from the evil sought to be remedied by sect. 7 of 24 & 25 Vict. c. 70. By sect. 6, locomotives are forbidden to be driven over any suspension or other bridge at all on which a notice has been placed by the surveyor or persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without the consent of the surveyor or persons liable to the repair of the bridge. Then comes sect. 7, and that applies to bridges across any stream or watercourse, navigable river, canal or railway which are what may be termed private property, and belong to some company or body that would be prejudiced by injury done to their bridges by the use of locomotives upon them. If it had been intended to apply to county bridges the inhabitants of the county would have been mentioned in the section, whereas the section refers to a more limited description of persons, "proprietors, undertakers, directors, conservators, &c." The provision which renders the owners of locomotives liable for damage is limited to trading partnerships or bodies or persons such as described. The interests of the inhabitants of a county and the public are sufficiently protected by sects. 6 and 13.

BLACKBURN, J.—I am of the same opinion. At common law the highways within a parish or township were repairable by the inhabitants of the parish or township, and where they were carried across small streams, the inhabitants of the parish or township were probably by immemorial custom also liable to repair the bridges; but bridges over large streams were repairable by the inhabitants of the county. In the case of *Reg. v. Ely* (19 L. J. 223, M. C.), it was held that he who, under lawful power, makes an artificial cut through a highway, and in whom the cut is vested for his own advantage, incurs the obligation to repair the bridge over the highway, yet not so as to relieve the parish or township from liability, for the Queen's subjects are not to be deprived of their right of coming upon the parish or township to repair. Now, remembering that many railway and canal companies cut through public highways, and necessarily erect bridges to continue the highways, the Legislature passed the enactment in sect. 7. It seems to me that the classes of persons meant therein are such as the Bedford Level

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Commissioner, Railway and Canal Companies, and such like, who are bound to repair the bridges over their works in case of the inhabitants of the parish or township, but it was never intended that the inhabitants should be freed, in cases like the present, in consideration of the great injury to the public from the bridge remaining in ruins, in case of the insolvency, death, or inability to find the owner of the locomotive that might have caused the damage. The section does not say that those persons who are liable to repair the bridge should be discharged from their liability, but that such companies or proprietors as I have mentioned, interested in or having charge of the bridge, shall not be liable to repair or make good the damage so occasioned, and that such damage shall be repaired to their satisfaction by the owner or person having charge of the locomotive at the happening of such damage. And the section gives them power to enforce such obligation by civil proceedings or *mandamus*, but not by indictment. The county ought, therefore, to have repaired this bridge and taken other proceedings. The conviction must therefore be quashed.

LUSH, J., and POLLOCK, B., concurred.

HONYMAN, J.—I am of the same opinion. Sect. 7 does not say that the damage is to be repaired to the satisfaction of the inhabitants of the county, which it should have done if the contention of the prosecution was right, but to the satisfaction of the persons named in the section.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

(Before KELLY, C.B., BLACKBURN, LUSH, and GROVE, JJ., and
POLLOCK, B.)

Saturday, Nov. 22.

REG. v. WEAVER (a.)

*Evidence—Register of birth—Certified copy—14 & 15 Vict. c. 99,
s. 14.*

An instrument certified to be a copy of an entry in a district Register Book of Births, and to be signed by the officer in whose custody the Register Book is stated therein to be, is admissible in evidence on its mere production under the 14 & 15 Vict. c. 99, s. 14.

CASE reserved for the opinion of this Court.

Handy Weaver was tried before me at the last Midsummer Sessions for the county of Glamorgan, on an indictment for lawfully and carnally knowing and abusing a girl, being above the age of ten years and under the age of twelve years.

The prisoner was convicted upon sufficient evidence in other respects, but it was objected by the counsel for the prisoner that the proof of age was not sufficient; and, having some doubt, I respited the execution of the sentence of penal servitude for five years in order to obtain the opinion of the Judges.

A copy of an entry in the Register Book of Births in the Registrar's District of Merthyr Tydvil Lower certified to be a true copy by the deputy superintendent registrar, with a further certificate that the said Register Book was then lawfully in his custody, was tendered by the counsel for the prosecution and received in evidence. The entry proved that a child, named therein Jane Watkins, was, at the date of the offence alleged in the indictment, of the age of eleven years and eight months.

This certified copy was tendered by the counsel for the prosecution without verifying or producing it in the proper way, no witness being in attendance to do so.

Elizabeth Abraham, the grandmother of the child who was the subject of the indictment, was called, and spoke the Welsh language only. I directed the sworn interpreter to translate every word of the certified copy into Welsh in the hearing of the witness. She then said:—"I believe, on my oath, that the child now present, and known as Jane Watkins, is the child named in the certificate now read." She also proved that the said child was the illegitimate child of Ann Abraham, daughter of the witness

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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(now in Australia), and of Benjamin Watkins; that her daughter, Ann Abraham, now passed as Ann Watkins; that she (the witness) was present at the birth, but not at the registration of the birth of her daughter's child, and that the said child was baptised in the name of Jane Watkins, though her mother was unmarried, and was Ann Abraham, and that she did not know the precise age of the child of her own knowledge, but knew it only by means of the said entry.

Sergeant Frederick Jennings proved that when he arrested the prisoner, and informed him that he was "charged with carnally knowing Jane Watkins last Friday," he replied, "I have nothing to say. She is a wicked girl. I could have no quiet for her," &c.

I told the jury that I thought there was some evidence that the girl Jane Watkins named in the indictment was the Jane Watkins named in the register, and, if they were satisfied as to that point, then the girl was within the statutable age, and they must proceed to find whether the prisoner had committed the offence set forth in the indictment. The jury brought in a verdict of guilty.

The point reserved on which the opinion of the Court of Appeal is requested is whether the reception of the certified copy of the register, as tendered by the counsel for the prosecution without calling a witness to produce it, was right, and, coupled with the evidence of the child's grandmother, was sufficient to support the finding of the jury.

The certificate itself is hereto annexed, and forms part of the case.

(Signed)

JNO. COKE FOWLER,
Deputy Chairman of the Glamorganshire
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No.	When and where born.	Name (if any).	Sex.	Name and Surname of Father.	Name and Maiden Surname of Mother.	Rank or Profession of Father.	Signature, Description, and Residence of Informant.	When Registered.	Signature of Registrar.	Baptismal name if added after Registration of birth.
463	Twenty-seventh of September 1861; 65, Ynysgan-street, Merthyr.	Jane.	Girl.	Benjamin Watkins.	Ann Watkins, formerly Abram.	Iron Miner.	X The Mark of Ann Watkins, Mother, 65, Ynysgan-street, Merthyr.	Fifth November, 1861.	Herbert James, Registrar.	

I certify that the above is a true copy of an entry in the Register Book of Births in the Registrar's District of Merthyr Tydfil Lower, in the Superintendent Registrar's District of Merthyr Tydfil, in the counties of Glam and Brecon. And I further certify that the said Register Book is now lawfully in my custody.

Witness my hand, this 1st day of July, 1878.

H. LEWIS, Deputy-Superintendent Registrar.

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H. L.
D. S. R.
STAMP.

Book No. 45.

By the 14 & 15 Vict. c. 99, sect. 14, a copy of any book which is of such a public nature as to be admissible in evidence on its mere production from the proper custody, is made admissible in evidence in any court of justice, provided it purport to be signed and certified as a true copy by the officer to whose custody the original is intrusted.

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No counsel appeared on either side.

KELLY, C.B.—The only questions raised in this case were, first, whether there was evidence of the identity of the girl Jane Watkins, upon whom the offence was committed, with the Jane Watkins named in the certified copy of the entry in the baptismal register produced, about which there is no doubt; and, secondly, whether the instrument produced, purporting to be a certified copy of an entry in the Register Book of Births was admissible in evidence on its mere production. That depends on two Acts of Parliament—the 6 & 7 Will. 4, c. 86, s. 32, and the 14 & 15 Vict. c. 99, s. 14. The later Act is the material one, and it provides that “Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy; any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted.” This instrument comes within that provision, for it purports to be a true copy of an entry in a book of a public nature, which is admissible in evidence on its mere production certified as a true copy by the officer to whose custody the original is entrusted. Its mere production is sufficient therefore to make it admissible.

Conviction affirmed.

NORTHERN CIRCUIT.

Carlisle, Thursday, Feb. 19, 1874.

(Before Mr. Justice DENMAN.)

REG. v. TOWERS.(a)

Manslaughter—Death through fright—Direct cause—Question for the jury.

Where A., in unlawfully assaulting B., who at that time had in her arms an infant, so frightened the infant that it had convulsions, although previously healthy, and from the effects of which it eventually died in about six weeks, A. is guilty of manslaughter, if the jury think that the assault on B. was the direct cause of death.

WILSON TOWERS was charged with the manslaughter of John Hetherington, at Castlesowerby, on the 6th of September, 1873.

Thurlow was for the prosecution.

Henry was for the defence.

The prisoner, who had been drinking on the 4th of August, went into a public-house at New Yeat, near Castlesowerby, kept by the mother of the deceased, and there saw a girl called Fanny Glaister nursing the deceased child, who was then only about four months and a half old, having been born on the 20th of March, 1873. The prisoner, who appeared to have had some grievance against Fanny Glaister about her hitting one of his children, immediately on entering the public-house went straight up to where she was, took her by the hair of the head and hit her. She screamed loudly, and this so frightened the infant, that it became black in the face; and ever since that day, up to its death, it had convulsions and was ailing generally from a shock to the nervous system. The child was previously a very healthy one.

The following evidence for the prosecution was then given:

Fanny Glaister said she was nurse with William Hetherington, innkeeper, New Yeat, near Castlesowerby; she was thirteen years of age. On August 4th she was nursing deceased, four and a half months old. It was a very healthy boy. On the day in question, Wilson Towers came into the house. He said she had

(a) Reported by H. THURLOW, Esq., Barrister-at-Law

been beating his child; she took the baby in her arms from Mrs. Hetherington, and sat down on her chair. Towers then came up to her, struck her on the mouth, and then lifted her up by the hair. She screamed, and this frightened the baby, and it cried till it was nearly black in the face. Mrs. Hetherington took the baby and followed Towers to the door; at that time the prisoner was not very drunk; the child went on screaming violently for more than an hour, and it had never cried like that before in its life. She remained with Mr. Hetherington until the 6th Sept., on which day the child died.

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Cross-examined.—The child never screamed like this before, and afterwards became ill, being sick and taking fits. The first fit it had was on the Sunday, after the day on which the assault was committed. About an hour before the child died it had had a fit of convulsions.

Ellen Hetherington said she was mother of the deceased; that when Towers came in the baby was in the cradle. After Towers had commenced to abuse the girl, witness gave Fanny Glaister the child to nurse and a chair to sit upon. When Towers took the girl by the hair, she took charge of the child and soon afterwards noticed that it became black in the face. Prisoner then went out. She tried to pacify the child, and put it into the cradle, where it slept, but in a very restless manner and sobbing all the time. It never rested properly during the whole of the time it lived; afterwards, about seven o'clock in the evening of August the 4th, it had a convulsive fit, which it never had before. Previous to this it had always been a very healthy child, a very quiet child, never screaming and had not been in the habit of crying. On Monday, August the 4th, she sent for Dr. Brown, but the child took fits every day, and it died on the 6th of September. On the Monday before it died it was also taken to Dr. Mitchell.

William Brown said he was a surgeon, and lived at Heskett-new-Market; that on the 4th of August he was called to Hetherington's house to see the child. He found it very irritable and flushed in the face. He prescribed an alterative medicine. From the symptoms displayed by the child, and supposing he had not been told anything about the case, he should have considered it was suffering from irritation of the nervous system. He saw it a few days afterwards and it was in much the same condition as before. He saw it once in a convulsive fit, which was brought on by witness sneezing within hearing of the child. The deceased gradually got worse. It was a strong, well-made, plump and healthy child when he first saw it on August the 4th. He examined its teeth when he first went and he did not think it was then teething, so that the convulsions he saw in the child would not, in his opinion, arise from that cause. Usually teething commences at seven months old. The appearances he saw in the child might be accounted for by sudden fright, for in every other way it was a healthy child.

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Cross-examined.—He did not see the child immediately before its death. It was buried and exhumed, but at the coroner's inquest they did not think it necessary to make a *post mortem* examination. As to the approximate cause of death, therefore, he knew nothing, and his opinion as to the cause was based upon Mrs. Hetherington's statement. She told him it had had frequent fits, but she did not know how many; understood it had fits of convulsion almost every day. In teething, the new teeth might be set in the gums before they are visible, and the child in that case would be more predisposed to nervous shocks. Children frequently die of convulsions brought on by teething. Has seen a case of fright before and the symptoms are general debility of the body, flushed face, nervous twitchings and startings. In this child noticed the flushed face, and a quick pulse of 140, the ordinary pulse in a child of that age being 100. At first did not notice the twitchings, but they only take place occasionally. The mother told him about the tremors and twitchings and noticed them himself when it was in a convulsion; teething might possibly have produced the symptoms he saw in the child.

Dr. Mitchell said he lived at South Yeat, near Castlesowerby, and was a physician; that about a week before it died the child was brought to him and that was the only time he saw it. It had not convulsions on it then, but was in a low condition and very irritable and in such a state that he saw it was subject to fits of convulsion. A sudden fright a month before, supposing it had then been in a healthy state, might have brought it to the condition in which it then was by working on it through convulsions.

DENMAN, J.—Suppose a child should suffer to the extent of convulsions in the early stage of teething, and then go down in health in consequence, would the teeth go on working their way in the same way as if the child was healthy, or would there be a cessation?

Witness.—The teeth would still go on, and from the appearance of the symptoms of teething to the appearance of the teeth through the gums, not more than a month would elapse, and frequently less.

Cross-examined.—Thinks a scream from a girl might throw the child into convulsions and eventually cause its death, or if it lived, cause it to be an idiot. The most morbid symptoms of fright were irritability and sleeplessness, though there were many more. Nothing definite might show itself for years.

This was the case for the prosecution.

Henry submitted there was no case to go to the jury, but

DENMAN, J., said, that he should leave it to the jury to say whether the death of the child was caused by the unlawful act of the prisoner, or whether it was not so indirect as to be in the nature of accident. This case was different from other cases of manslaughter, for here the child was not a rational agent, and

it was so connected with the girl, that an injury to the girl became almost in itself an injury to the child.

DENMAN, J., in summing up, said.—It was a very unusual case, and it was very unusual indeed to find a case in which they got practically no assistance from previously decided cases. There was no offence known to our law so various in its circumstances, and so various in the considerations applicable to it as that of manslaughter. It might be that in this case, unusual as it was, on the principle of common law, manslaughter had been committed by the prisoner. The prisoner committed an assault on the girl, which is an unlawful act, and if that act, in their judgment, caused the death of the child, *i.e.*, that the child would not have died but for that assault, they might find the prisoner guilty of manslaughter. He called their attention to some considerations that bore some analogy to this case. This was one of the new cases to which they had to apply old principles of law. It was a great advantage that it was to be settled by a jury and not by a judge. If he were to say, as a conclusion of law, that murder could not have been caused by such an act as this, he might have been laying down a dangerous precedent for the future; for, to commit a murder, a man might do the very same thing this man had done. They could not commit murder upon a grown-up person by using language so strong, or so violent, as to cause that person to die. Therefore, mere intimidation, causing a person to die from fright by working upon his fancy, was not murder. But there were cases in which intimidations had been held to be murder. If, for instance, four or five persons were to stand round a man, and so threaten him and frighten him as to make him believe that his life was in danger, and he were to back away from them and tumble over a precipice to avoid them, then murder would have been committed. Then did, or did not, this principle of law apply to the case of a child of such tender years as the child in question. For the purposes of the case he would assume that it did not; for the purposes of to-day he should assume that the law about working upon people by fright did not apply to the case of a child of such tender years as this. Then arose the question, which would be for them to decide, whether this death was directly the result of the prisoner's unlawful act—whether they thought that the prisoner might be held to be the actual cause of the child's death, or whether they were left in doubt upon that upon all the circumstances of the case. After referring to the supposition that the convulsions were brought on owing to the child teething he said that, even though the teething might have had something to do with it, yet if the man's act brought on the convulsions or brought them to a more dangerous extent, so that death would not have resulted otherwise, then it would be manslaughter. If, therefore, the jury thought that the act of the prisoner in assaulting the girl was entirely uncon-

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nected with it, that the death was not caused by it, but by a combination of circumstances, it would be accidental death and not manslaughter.

Not Guilty.

NORTHERN CIRCUIT.

Carlisle, Friday, Feb. 20, 1874.

(Before Mr. Justice DENMAN.)

REG. v. MACLEOD. (a)

Manslaughter—Medical man—Negligence—Evidence.

A medical man is bound to use proper skill and caution in dealing with a poisonous drug or dangerous instrument, and if he does not do so and death ensues he is guilty of manslaughter; aliter if it is want of skill arising from mere error of judgment.

ALEXANDER MACLEOD was charged with the manslaughter of his wife, Annie Macleod, at Carlisle, on the 15th of October, 1873.

Thurlow and *T. F. Fenwick* were for the prosecution.

Charles Russell, Q. C., and *Fawcett* were for the defence.

The case against the prisoner was that of having unlawfully killed his wife by having administered to her a large quantity of a certain drug called muriate of morphia. From the evidence it appeared the prisoner, who had been for about twenty or thirty years a surgeon on the medical staff of the Madras Army in India, came over to live in England, about a year and a half or two years ago, and shortly after came to Carlisle, and brought with him the deceased woman his wife. For a short time before the 15th of October, while the prisoner and his wife were living together in Chiswick-street, Carlisle, one of their children, who was about six years of age, became ill of typhoid fever, and for a fortnight before that the deceased woman had been in a bad and weak state of health. That indisposition was materially increased by having to attend to her sick child, which she had done most assiduously, and for several days previous to the 15th of October, she appeared never to have obtained good rest. In

(a) Reported by H. THURLOW, Esq., Barrister-at-Law.

the middle of that day—the 15th of October—she appeared very unwell indeed, and the prisoner, finding she had not obtained any proper rest, determined to give her an opiate. At 4 p.m. he went to Mr. Todd, a chemist in the town, and there obtained in a bottle twenty grains of morphia, and paid eightpence for it, that being the price of that quantity to a medical man. The prisoner went home, gave his wife one grain, after weighing it, and repeated other doses without weighing them; altogether he administered something like sixteen and half grains before seven o'clock that evening, in about three or three and a half hours. About 6.30 the prisoner went for Dr. Walker, and told him his wife had taken too much morphia, and as they were proceeding from Dr. Walker's house to the prisoner's they had a conversation in which the prisoner stated that he had given her repeated doses of morphia, that he had given her one grain as a first dose which he had weighed, but that in repeating the doses he had not weighed them, but guessed the quantity. Dr. Walker on his arrival found the poor woman lying on the hearth rug in front of the fire suffering from pain and apparently unconscious. Dr. Walker tried various means of restoring her. At twenty minutes before nine o'clock, Dr. Maclaren was called in and he injected atropine as an antidote. The deceased was then in a state almost comatose, and it was found impossible to rouse her. She died at ten o'clock, having all the symptoms of death by morphia. Under these circumstances it was submitted by the prosecution that the conduct of the prisoner had been so heedless and reckless in giving such large doses of morphia, that he was criminally liable and was guilty of the offence of manslaughter. For the prosecution the following evidence was given:

Elizabeth Mitchell said, I went to Dr. Macleod's as cook, on the 19th of October. I was in his service on the 15th October. Mrs. Macleod had not been well for nearly a fortnight before her death, but was taken worse the last few days. During the last three days she had not had any proper rest owing to her little boy being ill. On the morning of the day of her death when she came down to breakfast she did not appear at all well.

Cross-examined.—The prisoner also assisted in waiting on her all day. There were four children in the house, and the eldest boy was very ill of typhoid fever; the prisoner also attended to him, and prescribed for him. Mrs. Macleod was very anxious about the child and had no proper rest. For about three nights before her death she had hardly any rest at all. Dr. Macleod's rest was also much broken. They lived very happily together and did not visit much. I did not notice in the morning that Mrs. Macleod rather rambled in her mind, but I noticed it about three o'clock. She had given up the idea of going to the wedding of her sister three days before. On the day of her death she said she would like to go to the wedding, but would not like to leave her little boy. I took her breakfast in that

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morning, but she could not eat it, and as far as I know she had no solid food that day. Deceased died shortly before ten.

Elizabeth Dunne said she was employed as charwoman by Mr. and Mrs. Macleod. I went as soon as they took the house in Chiswick-street; as far as I can recollect it was about the 8th of July. I was for five weeks altogether from the 8th July; I was there during the whole of the week in which the 15th of October fell. I never waited on Mrs. Macleod. It was only once when she was ill that she required waiting upon. I saw the deceased a few days before the 15th of October; she was very poorly the whole of the week. She seemed very much depressed, very low, complained she had got no sleep, and was very anxious about the child. The child was ill about a fortnight before Mrs. Macleod died. No doctor attended either Mrs. Macleod or the boy. I was not present when Dr. Walker came, I left a little before seven and returned about nine. She died about a quarter before ten. I saw her about five o'clock on the day of her death lying on the hearth rug in the drawing-room; I threw a rug over her. She appeared to be then wandering in her mind. I also saw her at three o'clock when there was also a little wandering, but she was not so bad as at five, I saw her in the morning and she then said she felt very ill. While the child was ill she did nothing but wait on the child, of which she was very fond. When I returned at nine o'clock, Dr. Walker and Dr. Maclaren were there. I saw then if she was not dead she was very near it. She was lying at the foot of the stairs covered with rugs.

Cross-examined.—The doctors were endeavouring to rouse her up. I remember talking to her about the wedding. She told me to be sure to awake her at twelve as she was going by the half-past one train to Nottingham, to the wedding; this was at three o'clock, and I expect it was half-past one in the day she meant, she did not seem to know the hour.

William Rushton (Cecil-street, assistant to Mr. Joe Todd, druggist), said, I know Dr. Macleod. He came to our shop on the 14th of October last, asked for twenty grains of muriate of morphia, and I supplied him with it. I weighed it and put it into a small stopper bottle; I believe the bottle produced to be the same. It has a label on with the words "morphia muries." He said muriate of morphia. If he had asked for morphia simply I would have given him the same. I was about to put on a fresh label, and he said he would rather the old label remained the same as the bottle belonged to a medicine chest. I charged him eightpence for it—the price usually charged to a medical man; the twenty grains filled the bottle.

Mr. Walker said: I am a surgeon and honorary surgeon to the dispensary; had never attended Mrs. Macleod professionally before the day of her death. On the 15th of October, about seven o'clock in the evening, the prisoner called for me, being about the nearest doctor to where he lived. He said his wife was very ill, he was afraid she had taken too much morphia, and asked me

to go with him and I did so. On the way from my house to the prisoner's had a conversation with him; he said his wife had been attending upon a sick child, and she had very little sleep for about a week; that she was in a very excited state, and that he had given her some morphia to make her sleep, he did not know how much. He had given her one grain at first and he had given her several unknown doses every half hour; he said he guessed the quantities; he said he had given the first dose about four o'clock, but it took no effect, she had not been sent to sleep and she did not go to sleep till after the last dose. That was all the conversation they had. Prisoner then appeared to be in a very excited state. The drawing-room was down stairs, and I there saw Mrs. Macleod on the hearthrug before the fire with a blanket over her. She was in a state of coma, her breathing was difficult, she was livid in her face and her pupils were contracted, I failed to arouse her by shaking her, and went for my stomach pump and injected hot water, and what came back was the colour of port wine. Dr. Macleod said he had given her the morphia in port wine. Was away for my stomach pump about five minutes, and when I returned she was lying in the lobby covered with a blanket. Went on doing all I could to arouse her, aided by the prisoner, by applying mustard plasters to her legs and ammonia to her nostrils. We failed to arouse her, and I sent for Dr. Maclaren at half-past eight. He arrived and we injected into one of the veins atropine (an alkaloid of belladonna), to counteract the effects of the morphia. When I first arrived I could not tell whether her case was hopeless or not. In my opinion the deceased died from morphia. I made a *post mortem* examination in conjunction with Dr. Maclaren. The *post mortem* was consistent with death from morphia, and there was no other cause perceptible. In my opinion death resulted from poisoning by morphia. All the organs were healthy. Morphia is given to produce sleep and allay pain. Sometimes it is given generally for affections of the nervous system. It is a medicine well known, about equally known with atropine. Had no conversation with Dr. Macleod about the little bottle produced; Dr. Maclaren, who took charge of it, had seen the bottle, and as far as the appearance went it might contain about three grains. I have not very often administered morphia; it is a very ticklish thing to deal with. I know it to be dangerous, and I have not used it much. A grain has proved fatal; generally speaking a weak woman would not stand so much as a strong man. Sometimes a person suffering from disease would stand more than a healthy person. From reading, I know that one grain and less have proved fatal, and twenty grains have not. I don't recollect having any conversation with Dr. Macleod about whether he had given his wife morphia before. In my opinion prisoner administered the morphia in too great a quantity. It is very difficult to measure the weight of morphia by the eye, it should be done by being weighed.

Cross-examined.—The prisoner defended what he had done,

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and was not conscious of having made any blunder. There is a wide difference as to the mode of treatment by morphia; opium is used in cases of insomnia; morphia generally affects the patient rapidly, much, however, depends on whether there was much solid food in the stomach of the patient.

Dr. Roderick Maclaren said, I am a physician and graduate of Edinburgh University. Saw Mrs. Macleod, the deceased, a little before nine on the 15th of October; she was in the state described by Mr. Walker. Was present at the post-mortem examination; in my opinion, opium, in some form, was the cause of death; the prisoner gave me the bottles produced; it then contained three-and-a-half grains of morphia; he also told me that he had given deceased one grain at four o'clock, which he weighed, and then larger doses without weighing them, up to half-past six. He said she had not been in the habit of taking morphia. I have had considerable practical experience in administering morphia, and in my opinion his mode of treating Mrs. Macleod was not a proper one, the doses were excessive; if three or four grains of morphia are administered, the effect generally takes place in about twenty or thirty minutes.

This was the case for the prosecution.

DENMAN, J., in summing-up the case to the jury, said, the law was this, whether a man be a medical man or not, if he dealt with dangerous medicines he was bound to use them with proper skill, and was bound to bring proper care, and employ proper caution, so that persons should not be endangered by want of skill, on his part, or want of caution or care in dealing with those deadly ingredients. Whether it be deadly weapons, or drugs, the law was the same, and it made no difference whether a medical man was dealing with a patient or, as a volunteer, dealing with a friend or with his wife. The jury might be enlightened by looking at the relations between the parties, and he was by no means prepared to say that, in judging of the evidence, it would not enlighten them very much, and enable them to appreciate the evidence on the main point, whether the man did not do his best, not in the sense of doing a bad best—but doing a good best, he being a medical man, and therefore likely to know whether a drug was likely to be dangerous in the quantity administered or innocuous. There was ample evidence that the death of the deceased was caused by morphia. There was great difference of opinion as to the quantity of the drug which could be administered safely; however, if the jury were satisfied that the death was caused by morphia; and if it was administered without proper care, skill, and caution, and without a proper knowledge of morphia by the prisoner—whether in the weighing of the drug, or in any other way that would be clear negligence—he would not use the term “gross negligence,” because it was liable to misinterpretation—and if that was so, the prisoner would be guilty of manslaughter. But if the drug was administered without

want of skill and intending to do for the best—doing nothing, in fact, a skilful man might not do—then if the jury merely thought it was some error of judgment which anybody might have committed, the prisoner should be acquitted.

Not Guilty.

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COURT OF CRIMINAL APPEAL.

Saturday, Jan. 24, 1874.

(Before Lord COLERIDGE, C.J., KEATING, J., MELLOR, J., and
PIGOTT and CLEASBY, BB.)

REG. v. CREESE.(a)

Misdemeanor—Fraudulent removal of property by debtor—Assignment before liquidation—Debtors' Act, 1869, s. 11, sub-s. 5—Bankruptcy Act, 1869, s. 15—Bills of Sale Act.

A debtor, on the 17th of October, 1873, filed his petition for the liquidation of his affairs by arrangement and a trustee was duly appointed. In December, 1872, he had assigned his property to L. and W., to whom he was indebted (L. having then advanced a further sum of 350l. for the purpose of enabling the business to be carried on), upon trust, for the benefit of L. and W. and his scheduled creditors. There were other creditors than those scheduled. On the 14th, 16th, and 17th of October, 1873, the debtor fraudulently removed portions of the property so assigned to L. and W., and in respect of these removals he was indicted under the Debtors' Act, 1869, s. 11, sub-s. 5, for having, within four months next before the commencement of the liquidation of his affairs, fraudulently removed part of "his property," of the value of 10l. and upwards :

Held, that the offence was not proved, for the property was not his at the time of removal, but that of L. and W., the trustees under the assignment.

Secondly, that the assignment required to be registered under the Bills of Sale Act, 17 & 18 Vict. c. 36, and was inoperative against the trustee under the liquidation.

CASE stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

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Fraud.

On the 7th of January, 1874, the prisoner, Thomas Creese, was tried before me at the Worcestershire Quarter Sessions, on a charge of misdemeanor, under the 11th section of the Debtors' Act, 1869, for having within four months next before the commencement of the liquidation of his affairs, in pursuance of the Bankruptcy Act, 1869, fraudulently removed part of his property, of the value of 10*l.* and upwards.

The prisoner was, at the date of the assignment hereinafter mentioned, and for some years previously, the occupier of a farm of considerable extent, called "Fakener's Farm," as tenant to Earl Beauchamp from year to year.

In the month of May, 1872, the prisoner was in difficulties, and made a disclosure of his affairs to Mr. Henry Lakin, the land agent of Earl Beauchamp, and to a Mr. William White, both of whom were creditors of the prisoner for moneys previously advanced; and it appeared from such disclosure that the prisoner was largely indebted, and to an amount exceeding the total value of his assets, and would be unable to continue the farm without assistance. Thereupon Mr. Lakin and Mr. White each made a further advance to the prisoner by way of temporary assistance, and Mr. Lakin entered into communication with Messrs. Berwick and Co., of the Old Bank, Worcester, who were the principal creditors, and ultimately an arrangement was come to which is evidenced by the two documents next hereinafter stated.

The first of these documents (hereinafter referred to as "the assignment") was an indenture dated the 21st December, 1872, and made between the prisoner of the one part and the said Henry Lakin and William White of the other part, and duly executed by all the parties, whereby after reciting the tenancy of the prisoner of the said Fakener's Farm, and that he was then indebted to the said Henry Lakin and William White, and to the several other persons and firms whose names appeared in the first column of the schedule thereto in the several sums respectively set opposite to such names in the second column of the said schedule, and being unable to pay such sums, had applied to Messrs. Lakin and White to assist him in making some disposition and arrangement of his affairs, with a view to such ultimate liquidation of his debts as might be satisfactory to his creditors; and that, for this purpose, it had been agreed that he should assign unto Messrs. Lakin and White his tenancy of the said farm, and all other the property thereafter mentioned, upon the trusts thereafter declared; and that, in order to enable the business of the said farm to be carried on as thereafter mentioned, Mr. Lakin had agreed to advance to the prisoner a further sum of 350*l.*, for the purpose of meeting any then pressing demands, and supplying other urgent occasions. It was witnessed that, in consideration of the sums of money then due to Messrs. Lakin and White, and of the further sum of 350*l.* then stated to be paid and advanced by Mr. Larkin, the

prisoner thereby assigned all his estate, interest, tenant right, and tenancy in the said Fakener's Farm, and all the live and dead farming stock, corn, grain, hay and crops, implements of husbandry and effects, chattels, and utensils then in, upon, about, or belonging to the said farm; and all the household furniture and effects in and about the dwelling-house then in the occupation of the prisoner upon the said farm or elsewhere, and belonging to the prisoner. And all and every sums and sum of money owing to the prisoner, in respect of the said business, unto Messrs. Lakin and White, upon trust, to sell and convert the same into money at their discretion, in manner therein mentioned, and in the meantime, upon trust, to be and continue tenants of the said farm, and carry on the business thereof, and receive and take the moneys to arise therefrom, and to stand possessed of the moneys to arise from such sale and conversion, and from carrying on the said business; upon trust, in the first place, to pay the rent, tithe, rates and taxes, premiums on fire insurance, and the costs incidental to the assignment, and the current wages and outgoings necessary for carrying on the business of the said farm (including any salary to be paid to the prisoner, or any other person or persons, for managing the said farm), and also the said sum of 350*l.* so advanced by Mr. Lakin, and costs and expenses of the trustees as therein mentioned. And in the next place in or towards payment, at such times and by such dividends, as the trustees or trustee for the time being of the said assignment might think fit, of the said several sums of money in which the prisoner was then indebted to Messrs. Lakin and White and his other creditors, as thereinbefore recited, together with interest upon any debts upon which it might be necessary or desirable that interest should be paid, in order to obtain time for payment of the principal (and particularly upon a bank debt to the said Messrs. Berwick and Co.), and should stand possessed of the surplus (if any) of such moneys, upon trust for the defendant, his executors, administrators, and assigns. And it was thereby provided, among other things, that in case of any difficulty arising, as therein mentioned, the trustees should have power to wind-up the said farming business and other matters coming into their hands, either by proceedings in bankruptcy, as in an ordinary bankrupt's estate, or by liquidation, or by any other such means as they might see fit or think best, or might be advised, for the general good of the present creditors of the prisoner, without any let or hindrance from him. And it was also thereby agreed and declared that it was not contemplated that the said assignment should be registered under any Act of Parliament relating to the registration of bills of sale, and that Messrs. Lakin and White should not incur any liability by reason of the same not being registered.

In the schedule to the said indenture the names of sixteen

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creditors only appeared, whose debts amounted in all to 4210*l.* 9*s.* 10*d.* Among such creditors were the following:

		£.	s.	d.
1874.	The said Messrs. Berwick and Co. for	2969	11	10
	The said William White	473	17	2
Misdemeanor	The said Henry Lakin	213	1	0
—Debtors' Act,	Earl Beauchamp, for rent and tithe.....	271	19	6
1869, s. 11—				
Fraud.				

The other twelve creditors in the schedule were for smaller amounts.

The assignment comprised substantially all the prisoner's property, and it has never been registered under the Bills of Sale Act. The provision in the assignment for not registering the same was inserted at the request of the prisoner, and for the purpose of saving his credit.

The second of the documents before referred to was an agreement dated the 23rd December, 1872, and made between the said Messrs. Lakin and White of the one part, and the prisoner of the other part, and signed by all the parties, whereby in effect the prisoner agreed to serve Messrs. Lakin and White in the capacity of bailiff or manager of the said farm, from the 21st December, 1872, until such service should be discontinued by a month's notice of either party, and whereby it was stipulated, among other things, that any purchases and sales which the prisoner might make on account of the said farm should be made only with consent of Messrs. Lakin and White, and that the prisoner was, so long as the service continued, to have a salary of 100*l.* per annum, and to occupy the house on the farm, except three rooms, which were reserved by Messrs. Lakin and White for occupation by any other person whom they might appoint.

The originals of these two documents will be in Court on the hearing of this case, for reference if required.

Formal possession was given to Messrs. Lakin and White on the execution of the assignment, and thenceforth the prisoner continued to carry on the farm ostensibly as owner, but in reality as their bailiff and manager, and he did not, to the knowledge of Messrs. Lakin and White, until the time hereinafter mentioned, sell or purchase any stock on account of the farm, without the previous consent of them or one of them.

The said arrangement was communicated to Messrs. Berwick and Co. and to Earl Beauchamp, and assented to by them. It did not appear at the trial whether the same was or was not communicated or known to any other creditor of the bankrupt.

Before the completion of the said arrangement, the prisoner handed to the trustees a list of debts, which he represented to be all that he then owed. That list comprised the debts mentioned in the schedule to the assignment, and also a number of other small debts, amounting in the aggregate to about 150*l.*, which it was intended to discharge at once out of the 350*l.* advanced by Mr. Lakin. The prisoner, however, knew at the

time, and it was the fact, that he was then indebted to other persons not named in the list, and one, at least, of such undisclosed debts, viz., 300*l.* due to a Mr. Oliver Grub, on the prisoner's note of hand, is still unpaid.

All the debts mentioned in the said schedule to the assignment are also still unpaid, except four or five, the largest of which did not exceed 10*l.*

There are other debts of the prisoner still unpaid, which were contracted between the dates of the assignment and the commencement of the liquidation.

The 350*l.* advanced by Mr. Lakin at the date of the assignment, was intended by all parties to be applied, and was applied, as follows, viz., 150*l.*, or thereabouts, in discharging the small debts in the list produced by the prisoner and not included in the schedule to the assignment, and the remaining part thereof in carrying on the business of the farm for the benefit of the trust.

On the 17th of October, 1873, the prisoner, while still carrying on the business of the said farm as the bailiff or manager of the trustees under the said arrangement, instituted proceedings in the County Court of Worcester, under the Bankruptcy Act, 1869, for the liquidation of his affairs by arrangement, and on the 18th of October, 1873, a receiver was appointed by the Court, who thereupon proceeded to take possession of the said farm and the stock and effects remaining thereon.

On the 7th of November, 1873, at a meeting duly summoned of the prisoner's creditors, it was resolved by a statutory majority, that the affairs of the said prisoner should be liquidated by arrangement, and one Francis Spooner was appointed and is now trustee under such liquidation. In the meanwhile it was discovered that on the 14th, 16th, and 17th of October, 1873, the prisoner had, without the consent or knowledge of Messrs. Lakin and White, or either of them, removed a large quantity of stock comprised in the assignment, of the value of several hundred pounds from the said farm, and sold the same, and applied the proceeds for the most part in payment of the debts of creditors not named in the schedule to the assignment.

It is not necessary to state in detail the circumstances of such removal, since it has been found by the jury, and is for the purposes of this case to be taken as a fact, that the removal was fraudulent.

It was, however, objected by Mr. Godson, on behalf of the prisoner, that the stock so removed was vested in Messrs. Lakin and White by virtue of the assignment, and, consequently, was not, and ought not to be considered as the prisoner's property, within the meaning of the 11th section of the Debtors' Act, 1869.

I declined to withdraw the case from the jury on that objection, being of opinion that the assignment was void against the trustee under the liquidation, either under the Bills of Sale Act for want of registration, or under the Bankruptcy Act, 1869,

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as being an act of bankruptcy within twelve months of the commencement of the liquidation, and that having regard to the 15th section of the Bankruptcy Act, 1869, and the 3rd section of the Debtors' Act, 1869, all property divisible among the prisoner's creditors under the liquidation must be considered as his property, within the meaning of the last-mentioned Act; but I consented to reserve the point.

The jury returned a verdict of guilty, and the prisoner was sentenced to four months' imprisonment, but the sentence was respited, and the prisoner admitted to bail pending the decision upon this case.

The question on which I respectfully desire the opinion of the Court is—Whether the stock comprised in the assignment of the 21st December, 1872, and so removed by the prisoner as afore-said, was the property of the prisoner within the meaning of the 11th section of the Debtors' Act, 1869.

(Signed) R. PAUL AMPHLETT,
Chairman of the above Court of Quarter Sessions.

Godson for the prisoner.—The conviction cannot be sustained, for the property removed by the prisoner was not his, within the meaning of the 11th section of the Debtors' Act, 1869, subsection 5, which enacts "that any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement, in pursuance of the Bankruptcy Act, 1869, shall be deemed guilty of misdemeanor, "if after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of 10*l.* or upwards." By the assignment of the 21st of December, 1872, the property was vested in Lakin and White; and it so continued to be up to the 17th of October, 1873. But it was objected (1), that the assignment was null and void as against the trustee for want of registration under the Bills of Sale Act (17 & 18 Vict. c. 36); and (2) that it was null and void as being an act of bankruptcy. As to the first point, this was an assignment for the benefit of all the existing creditors of the prisoner, and not for a selected class only, as appears by the proviso at the end of the deed: "In case of any difficulty arising, the trustees should have power to wind-up the business as they should see fit for the general good of present creditors of the prisoner," and that being so, it was not a bill of sale that required to be registered: (sect. 7.) At all events the deed was binding *inter partes*, and passed the property to the trustees as against the prisoner. Secondly, this assignment was not an act of bankruptcy. This was an assignment not in consideration of a past debt merely, but there was an additional advance also. The case falls within the principle laid down in *Ex parte Fisher, re Ash* (26 L. T. Rep. N. S. 931), that the assignment by a debtor of all his effects, partly as a security for a past debt, and partly as

a security for a substantial fresh advance is not necessarily an act of bankruptcy. Here the 350*l.* being a substantial advance to enable the farm to be carried on, the assignment was valid: (*Mercer v. Paterson*, 37 L. J. 54, Ex.) Again, the petition was not filed within six months of the date of the deed. It will be further contended that the deed is avoided by the title of the trustee under the liquidation relating back to the date of its execution; but the doctrine of relation does not apply to criminal cases.

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Jelf, for the prosecution.—First, the property removed was that of the prisoner, under sub-sect. 5 of sect. 11 of the Debtors' Act, 1869. Sect. 3 of that Act enacts that "words and expressions" defined or explained in the Bankruptcy Act, 1869, shall have the same meaning in the Debtors' Act, 1869. The word "property," therefore, in sub-sect. 5 of sect. 11 of the Debtors' Act means property divisible among the debtor's creditors, and the sub-section will then read, "removes any part of his property divisible among his creditors." That this was a bill of sale within the Bills of Sale Act requiring it to be registered, admits of no real doubt. Secondly, if this assignment was an act of bankruptcy, the property removed was the prisoner's at the time of the removal. As to whether the assignment was an act of bankruptcy, the decisions are conflicting. According to the case *Ex parte Fisher, re Ash* (*sup.*), the amount of the fresh advance is to be looked at with reference to the amount of existing debts and the extent of the estate. The circumstances in this case show that it was an act of bankruptcy: (*Lomax v. Buxton*, 24 L. T. Rep. N. S. 137; 40 L. J. 150, C. P.) On the face of the deed it appears that 350*l.* was not a substantial advance: (*Ex parte Cohen*, L. Rep. 7 Ch. App. Bank. 20; 25 L. T. Rep. N. S. 473.)

Godson in reply.

Cur. adv. vult.

LORD COLERIDGE, C.J., delivered the judgment of the Court.—The defendant was indicted under the 5th sub-section of sect. 11 of the Debtors' Act, 1869, for having, within four months of his petition for liquidation, fraudulently removed a part of his property. And the question was, whether certain property removed by him on the 14th and 16th days of October (which was within the period specified, and as to which the jury found that the removal was fraudulent) was his property, within the meaning of that provision. It appeared that on the 21st day of December, 1872, the defendant had by indenture, for certain consideration, assigned his farm and all the property thereon to certain persons as trustees, upon certain trusts therein mentioned, and it is to be taken that the property removed was part of the property comprised in that deed. The property no doubt passed under the deed, but the deed was not registered, and it was therefore contended for the prosecution that by the Bills of Sale

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Act the deed was void, to all intents and purposes, against assignees in bankruptcy, and, therefore, at the time of the removal, the defendant was dealing with property upon which the deed did not (under the events which had happened) operate, and that therefore it was the defendant's property, and divisible among his creditors as such, so as to bring the same within the words and meaning of the section. We are all of opinion that the indenture required registration, and so was inoperative against assignees in bankruptcy. It was contended that the deed was a deed for the benefit of creditors, so as to come within the exemption in the Bills of Sale Act. It has been held in the case of the *General Furnishing Company v. Venn* (32 L. J., 220, Ex.), that creditors in the Bills of Sale Act means *all* the creditors; and, therefore, having regard to the trusts in the deed, viz., First, to pay the 350*l.* advanced by Lakin and White; secondly, to pay certain creditors named, being a selection of the defendant's creditors, and then in trust for the defendant, we are clearly of opinion that it does not come within the description of a deed for the benefit of the creditors, as interpreted by authority. It is a deed for the benefit of certain creditors, and of these unequally; and is, besides, a deed not founded upon the consideration of subsisting debts, but upon a new consideration and advance. That being so, as soon as there was a petition for liquidation, the deed was void as against the trustee, and the property comprised in the deed became the property of the trustee. But it does not, in our opinion, follow from this that it was the property of the defendant on the 16th day of October, or at any time between the assignment and the liquidation. The assignment is absolute, and irrevocably transfers the property. There is no imaginable state of things under which the property could return to the defendant. The resulting trust of the surplus, after paying all the debts specified, cannot be regarded as giving the defendant, even contingently, any interest in the goods themselves. In this case, the trustee under the liquidation does not make title to the property through the defendant, as being his at the time of the petition, but claims the goods as having been the defendant's at the time of the assignment, and then the assignment by the Act of Parliament cannot be set up against him. Just as in the case of payments by way of fraudulent preference. The bankrupt voluntarily, and in contemplation of bankruptcy, pays a particular debt: he can never by possibility acquire any right to it; but his assignee in bankruptcy can recover it back, not because it became his (the bankrupt's), but because he ought not to have made the payment, and deprived the estate of the benefit of the amount. If any person had seized or converted the goods after the assignment, the defendant could never have maintained an action, and the assignee, in order to recover, must treat it not as a wrong done to the defendant, but as a wrong done to him as trustee. The learned counsel for the prosecution appeared to feel that this

conclusion was unavoidable, and he therefore mainly relied upon a construction of the sub-section in question which, if correct, might sustain the present indictment. He contended that the proper meaning of the words "his property," in the 5th sub-section, was property divisible among his creditors, and that as the property in this case became divisible among his creditors, the offence was proved. To this argument there are two answers: First, at the time when the act was done it was not property divisible among his creditors, but became so by notice of a subsequent event which might or might not have happened; and you cannot upon general principles (except by virtue of some clear and express enactment) alter the character of an act by something which occurs afterwards so as to make it criminal. But it is not necessary to resort to this answer, because we think the argument of the learned counsel as to the construction of the sub-section in question is not well founded. The argument was based upon a comparison of the words in the sub-section in question with that of other sub-sections, and particularly upon that of the 15th section of the Bankruptcy Act, 1869. That section commences as follows:—"The property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt," so that in the Bankruptcy Act the words, "property of the bankrupt," means his property divisible among his creditors. The section then specifies what property is not divisible, and therefore does not come under the word property, viz., property held in trust, and tools of trade, wearing apparel, &c., of a certain value, and afterwards what property is divisible. By the third section of the Debtors' Act, 1869, words and expressions in that Act have the same meaning as in the Bankruptcy Act; so that in the Debtors' Act, the words, "property of the bankrupt," mean "his property divisible among his creditors." They must be so read in the 5th sub-section, and the offence would consist in removing the property of the bankrupt divisible among his creditors, so as not to apply to trust property or tools of trade, &c. But we were asked, upon the comparison above mentioned, to read the words as not referring to the property of the bankrupt divisible, but to something which is not his property at the time, but afterwards becomes divisible by the operation of the bankruptcy law; a reading of the statute opposed, as we think, to true rules of construction, and violating the principle as to altering the quality of acts, innocent when done, so as to make them criminal by relation, to which we have already adverted. It therefore appears to us, that in the present case the defendant improperly removed the property of the trustees under the deed, and not his own property. The date at which the act was done warrants the conclusion that it was done to evade the operation of the bankrupt laws, which may be said of all cases of fraudulent preference; but another enactment is necessary, in addition to the 16th sub-section of the 11th section, and the three sub-

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sections of the 13th section to meet such a case as this. We had a considerable argument, and many authorities were referred to for the purpose of showing that the assignment was an act of bankruptcy, so as to avoid the deed, and so give the assignees a title by relation back to that time. But as we have treated the deed as wholly void against the trustee in liquidation, by virtue of the Bills of Sale Act, it appears unnecessary to consider whether it is capable of being considered as an act of bankruptcy. It is fortunate that we deem this unnecessary, because (after the cases of *Lomax v. Buxton*, 24 L. T. Rep. N. S. 137; L. Rep. 6 C. P. 107, and *Ex parte Fisher, re Ash*, L. Rep. 7 Ch. Ap. 636; 26 L. T. Rep. N. S. 931), being unable in a criminal case to draw inferences of fact, we have hardly materials before us to determine whether the deed was an act of bankruptcy or not. It was suggested, that at all events the defendant, as bailiff with possession, had a qualified property in the things removed, and that this was sufficient; but independent of other objections, the previous argument of the learned counsel had disposed of this argument, since it could not be contended that this qualified property was divisible among his creditors, so as to come within the section. For the reasons assigned, we think that the defendant, on the 14th and 16th days of October, did not remove his own property, and therefore the conviction must be quashed.

Conviction quashed.

PHILADELPHIA, U.S.

*Tuesday, December 6th, 1873.**(Before PIERCE, J.)*

COMMONWEALTH v. MAGEE. (a)

A judge may, where the evidence is clear and uncontradicted, and the character of the witnesses unimpeached and unshaken, tell the jury in a criminal case that it is their duty to convict.

THIS was a motion for a new trial and in arrest of judgment on the ground of misdirection in the charge to the jury.

PIERCE, J., in his judgment said, the evidence against the defendant was clear and explicit by two witnesses, who testified to having bought and drunk liquors at the defendant's place within this year; one said he thought it was in the month of April; the other said, "one time was in April, I remember." The defendant offered no testimony. There was nothing in the manner or matter of the witnesses to call in question their veracity, or in the slightest degree to impugn their evidence. The counsel for the defence did not in any manner question the truth of their evidence, but confined his address to the jury to an attack upon the law and the motives of the prosecutors. Were the jury, under these circumstances, at liberty to disregard their oaths and acquit the defendant? They had been solemnly sworn to try the case according to the evidence, and a regard to their oaths would lead them but to one conclusion, the guilt of the defendant. After carefully stating the evidence to them, I told them that I had no hesitation in saying that it was their duty to convict the defendant. The counsel for the Commonwealth states the charge to have been "The judge declared that he had no hesitation in saying, that under the evidence, it was the duty of the jury to render a verdict of guilty under the bill of indictment." But no matter which form of expression was used, it was the evidence to which I had just called their attention that indicated their duty, and in view of which the remark was made. I perceive no error in this. It was not a direction to the jury to

(a) Although an American case, the principles of the criminal law being the same as in England, and the like duties and powers of the judge being recognised, a carefully prepared judgment on an important question that may arise here at some time has been deemed worthy of a place for any future reference.—EDITOR.

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convict the defendant. It was simply pointing them to their duty. Jurors are bound to observe their oaths of office, whether it will work a conviction or acquittal of a defendant, and they are not at liberty to disregard uncontradicted and unquestioned testimony at their mere will and pleasure. Where, however, the testimony is contradicted by testimony on the other side; or a witness is impeached in his general character, or by the improbability of his story, or his demeanour, it would be an unquestionable error in a judge to assume that the facts testified to by him had been proved. In *Delany v. Robinson* (2 Wharton, 507), Chief Justice Gibson says: "It will not be pretended that a jury may find capriciously and without the semblance of evidence, or that the court may not set aside their verdict for palpable error of fact; and if it may subsequently unravel all they have done, why may it not indicate the way to a wholesome conclusion in the first instance. . . . Without this process of judicial review, causes would frequently be determined, not according to their justice, but according to the comparative talents of the counsel. To hold the scales of justice even, a judge may fairly analyse the evidence, present the questions of fact resulting from it, and express his opinion of its weight, leaving the jury, however, at full and active liberty to decide for themselves. The judge who does no more than this, transcends not the limits of his duty." This was said in a case in which there was a conflict of testimony. It is the duty of the Court, when it is decidedly of opinion that the evidence given by the plaintiff, supposing it to be all true, does not tend to prove such facts as will in law entitle him to recover, to tell the jury so. And if the jury were, after such direction from the Court, to find a verdict for the plaintiff, it would be the duty of the Court to set it aside and grant a new trial: (*Matson v. Fry*, 1 Watts, 435, Kennedy, J.) To submit a fact destitute of evidence as one that may nevertheless be found, is an encouragement to err, which cannot be too closely observed, or unsparingly corrected: (*Slooppe v. Latshawe*, 2 Watts, 267, Gibson, C.J.) It is error in the Court to submit a fact to the jury of which there is no proof: (*Miller v. Oresson*, 5 W. & S. 284.) When the evidence on a question is all one way the Court is justified in not transmitting the question as one of fact to the jury: (*U. S. v. 1 Still*, 5 Blatch. C. C. 403.) See also *Davis v. Handy* (6 B. & C. 154), in which Abbot, J., says: "Where a witness is unimpeached in his general character, and uncontradicted by testimony upon the other side, and there is no want of probability in the facts which he relates, I think a judge is not bound to leave his credit to the jury, but to consider the facts he states as proved, and to act upon them accordingly. To warrant an unqualified direction to the jury in favour of one party or the other, the evidence must either be undisputed, or the preponderance so decided that a verdict against it would be set aside, and a new trial granted. The rule with regard to the positive instruction of the Court to find facts

admits of the qualification, that where the verdict is in strict accordance with the weight of evidence, and justice has consequently been done, a new trial will not be granted, though the direction be positive: (*Graham and Waterman on New Trials*, 751.) There are occasions in which it becomes the solemn duty of a judge, in maintenance of the law and furtherance of public justice, to express his opinion clearly and unmistakably upon the facts submitted in evidence. And this was one of these occasions. The law under which the defendant was prosecuted has been openly derided and defied. Bad men have conspired to defeat it. They openly violate it, and perjured witnesses, and juries disregarding of their oaths, have given impunity to the transgressors. And all this has occurred in the very tribunals of justice seeking to administer the law and in the course of its administration. A judge who would hesitate, under these circumstances, to instruct a jury in their duty, would seem to me to be unworthy of the trust reposed in him. No objection was made to the charge by the counsel for the defendant at the time it was given, and the jury, after deliberate consideration, rendered a verdict of guilty. The motion for a new trial is refused.

Lewis D. Vail and Geo. D. Stroud, Esqrs., for Commonwealth.
Jos. A. Bonham and James H. Hevering, Esqrs., for defendant.

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June 7 and 8, 1873.

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*Extradition Act—33 & 34 Vict. c. 52—Duty of police magistrate—
His decision not reviewable—Deposition of a witness examined
at a former hearing before a different police magistrate.*

*By the 33 & 34 Vict. c. 52 (The Extradition Act) when a fugitive
criminal is brought before a police magistrate, the latter is to
hear the case in the same manner and to have the same juris-
diction and powers, as near as may be, as if the prisoner were
brought before him charged with an indictable offence committed
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Held, upon a rule for a habeas corpus, upon a committal by a

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police magistrate, that as this is not a court of appeal in such a case it will not question the judgment of the magistrates if the case was within his jurisdiction and there was any evidence to support his decision.

Upon such a hearing, a witness gave his evidence before a police magistrate (a) in the presence of the accused and signed his deposition. The further hearing of the case was then adjourned, and on the adjournment day the further hearing was resumed before B., another police magistrate, but as the witness before examined before A. refused to attend and had gone abroad, his deposition made before A. was proved to have been duly taken and was read as part of the case against the accused, whereupon, additional evidence having been taken, the prisoner was committed to the Middlesex House of Detention pursuant to the Act. Held, per Martin and Pollock, BB. (Kelly, C.B., dubitante), that the deposition so taken at the former hearing by A. was properly receivable by B. upon the subsequent hearing.

UPON a former day Besley obtained a rule nisi for a writ of *habeas corpus* to bring up Ernest Etienne Huguet, a Frenchman in custody of the Governor of the House of Detention, upon a warrant of Sir Thomas Henry under the provisions of 33 & 34 Vict. c. 52 (an Act to amend the law relating to the extradition of criminals), in order that he may be discharged from custody.

It appeared from the affidavits that the applicant, who is a

(a) By sect. 7 of the 33 & 34 Vict. c. 52, it is enacted that "a requisition for the surrender of a fugitive criminal of any foreign state who is in, or suspected of being in, the United Kingdom, shall be made to the Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal," &c.

Sect. 9. "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and power, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England," &c.

Sect. 10. "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. . . . If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of the Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of committal, and such report upon the case as he may think fit."

Sect. 11. If a police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. Upon the expiration of the said fifteen days, or if a writ of *habeas corpus* is issued, after the decision of the court upon the return of the writ as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State by warrant under his hand and seal to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from the requisition for his surrender proceeded; and such fugitive criminal shall be surrendered accordingly.

French subject, left France and came to England in April, 1872, having in his possession the sum of 27,000f., being at that time a banker in Paris and the editor and proprietor of a newspaper called *L'Avenir Liberal*; that whilst in England he was adjudged by the French Courts to be a fraudulent bankrupt and was ordered to be put upon his trial for fraudulent bankruptcy. A requisition was accordingly made by the French authorities to the Foreign Secretary (Lord Granville) of this country, and thereupon he made an order requiring a police magistrate to issue his warrant for the apprehension of the applicant. A warrant was accordingly issued, and he was brought before Mr. Vaughan, one of the police magistrates at Bow-street. Evidence was then taken, and Mons. de Monchairville, the official assignee in France under the bankruptcy, gave evidence of all the facts connected with such bankruptcy of an official nature. He was cross-examined by the counsel of the applicant, and he signed his deposition in due form. The further hearing of the case was then adjourned, and upon the adjourned meeting Sir Thomas Henry presided. Upon that occasion a quantity of French documentary evidence was produced, and a Mons. Adolphe Moreau, counsel to the French Embassy in London, gave evidence of the French law upon the subject, and thereby established the fact that the applicant had, according to the evidence, made himself amenable to the charge of being a fraudulent bankrupt. Mons. de Monchairville was not required to give evidence before Sir Thomas Henry as he had before given it before Mr. Vaughan, for it appeared that at the adjournment of the former hearing he announced that he would not again attend, and would go to Paris, and he did not in fact again attend. Upon this, Mr. Humphries, the second clerk at Bow-street, deposed to the due taking of the deposition of Mons. de Monchairville before Mr. Vaughan, and to his cross-examination on behalf of the applicant. Upon this proof Sir Thomas Henry received in evidence the deposition so made, and the case being complete he committed the applicant to the Middlesex House of Detention to await the warrant of the Secretary of State for his surrender^(a). The rule was moved upon the grounds—First, that there was not sufficient evidence of the commission of any offence justifying the application of the Extradition Act, 1870; secondly, that Sir Thomas Henry had no jurisdiction to act upon any deposition not taken before himself.

The *Attorney-General* (Sir J. D. Coleridge, Q.C.) and *Bowen* showed cause.—If the magistrate had jurisdiction to inquire into the case, this Court will not interfere with the result at which he has arrived. It is clear that he had such jurisdiction to inquire, and it was for him alone to form an opinion, precisely as it would have been if the charge had been of an offence committed in this country, and the inquiry had been one with a view to a committal to trial. The question of whether or not

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(a) See note on preceding page.

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there is a *primâ facie* case is one intrusted entirely to the magistrate: (*Reg. v. Bolton*, 1 Q. B. 66.) As regards the second objection, that Sir Thomas Henry did not hear the whole of the evidence, and that he acted upon the evidence of Mons. de Monchairville, who was examined on a previous day before another magistrate, there is nothing objectionable in his having done so, and the case of *Reg. v. Vidil* (9 Cox's Crim. Cas. 4) is in point. There the prisoner was indicted for unlawfully, maliciously, and feloniously cutting and wounding Alfred John de Vidil, with intent to murder him. A witness being too ill to travel, it was proposed to read his deposition, and the magistrates' clerk being examined, he said that he was the chief clerk at Bow-street, and that on the 16th day of July he went down to Twickenham, in consequence of the illness of the witness Rivers. That the prisoner was then in custody; that the charge against him was for unlawfully, maliciously, and feloniously cutting and wounding one Alfred John de Vidil, with intent to murder him; that the charge was made at Bow-street, before the magistrate there, and that in consequence of the illness of the witness, the prisoner was taken down to Twickenham, and the witness's deposition was taken before two county magistrates, in the presence and hearing of the prisoner, and signed by them; and that subsequently, upon a further investigation at Bow-street, the prisoner was committed by the magistrate here. Upon this it was objected by Serjt. Ballantine that the deposition could not be read, the 11 & 12 Vict. c. 42, enacting that in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, &c., before he or they shall commit such accused person to prison for trial he shall in the presence, &c., take the statement on oath, &c., and shall put the same into writing, and such deposition, &c., shall be signed by the justice or justices taking the same; and he contended that the meaning of this was, that the deposition should be taken by the magistrate before whom the charge is made and by whom the prisoner is committed, and that in that case there was the intervention of other magistrates for the purpose of taking that single deposition, those magistrates not being the magistrates before whom the charge was made or by whom the prisoner was committed. Mr. Justice Blackburn, however, said, "I am of opinion that it was not intended by the two sections referred to (17 and 18) to confine the admissibility of a deposition to the case of a person examined before the magistrate before whom the charge is made, and who commits the prisoner for trial. The meaning of the provision in the Act is this, that when a witness may be in a distant part and too ill to travel, the magistrate or magistrates acting for that locality may take the examination, of course in the presence of the accused, and with the formalities enjoined, and return it to the proper quarter. Here the deposition was read over to and signed by the witness, and also signed by the justices taking

the same. It was taken in the presence of the prisoner, and he had full opportunity of cross-examining. It seems to me that all that is necessary has been complied with, and I shall allow the deposition to be read." That case quite disposes of this objection. The case of *Reg. v Watts* (33 L. J. 63, M. C.) is not in point, for in that case the Court held that the depositions had not really been taken in the presence of a magistrate.

Chambers, Q.C. and *Besley* for the applicant.—This Court will examine the decision of the committing magistrate, and if it finds that the magistrate has acted upon insufficient materials, and has come to a wrong decision it will interfere, otherwise the right to a writ of *habeas corpus* is illusory. They argued that the materials before the magistrate were insufficient to prove any crime for which in this country the applicant might be committed for trial. As regards the second point, that Sir Thomas Henry had no jurisdiction to act upon a deposition not taken by him—the case of *Reg. v. De Vidil* is no authority because it was decided upon wholly different materials. It cannot be that one magistrate may take a deposition, and another may judge of its relevancy and importance; if this were so, a case may be heard at a dozen different adjournments by a dozen different magistrates.

KELLY, C.B.—I am of opinion that this rule should be discharged. It has been said by the Attorney-General that as there was evidence before the magistrate of a fraudulent bankruptcy, his jurisdiction to make his warrant of commitment cannot be impeached. No arguments have been addressed to us with regard to our jurisdiction to deal with a case like this, but it is said that if a magistrate had jurisdiction to hear, we have no power to interfere. This, however, is stated in terms rather too wide. Suppose, for instance, a charge be made against a foreigner residing in this country for a murder committed by him in France, and that when it came before the magistrate it should appear that the party survived more than a twelvemonth; I am of opinion that that would not be a subject of extradition, and that if the magistrate were to make his warrant for his detention, we could not interfere. Where, however, there is evidence of experts in French law which shows a crime committed in France, which if committed here would be punishable by our law, we have no right to question the truth of the testimony. In such a case it is for the magistrate to decide, and although we may think that the case is very inconclusive, we cannot interfere. He is the only party authorised to decide upon the facts. Such being the law, what are the objections? It appears that the applicant was charged with fraudulent bankruptcy, and the first question is, Had he been guilty according to law? Now upon that I cannot bring myself to entertain a doubt. (His Lordship then reviewed the evidence upon this point.) Then there is another objection. It appears that in the course of the proceedings the evidence of a gentleman named

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Monchairville was taken before another magistrate than the one who ultimately decided the case. Now the receiving of such evidence is certainly almost entirely contrary to practice. If evidence is to be acted upon, it should be heard by the committing magistrate, and he ought not to act upon any deposition taken before another magistrate; and except in the case of *Reg. v. De Vidil*, before my Brother Blackburn, I know of no other case of a similar description; and notwithstanding the opinion of my Brother Martin, I entertain great doubt whether the deposition of M. de Monchairville was admissible in evidence before Sir Thomas Henry. But I accede to the Attorney-General's argument, that if there was sufficient evidence before Sir Thomas Henry without that deposition, then it becomes immaterial, and I think that there was sufficient evidence without it. Under these circumstances the objection fails.

MARTIN, B.—I am of opinion that the law has been correctly laid down in the cases cited. The question is, Was this a proceeding within the jurisdiction of Sir Thomas Henry? I don't say that if there had been no evidence before him, or he had acted contrary to law, we would not have discharged the prisoner; but it appears to me that all the proceedings have been properly taken. This is not a court of appeal from his decision, and it is for him to decide whether or not the evidence is sufficient. It has, however, been strongly insisted that the evidence taken before Mr. Vaughan was not admissible before Sir Thomas Henry so as to enable him to act upon it. Now, I don't mean to express any positive opinion, but I think that such evidence was admissible at common law. The witness who has made a deposition upon oath will not appear, but goes abroad. Here is an inquiry in the same matter between the same parties, and the witness's deposition is admissible at common law. The argument as to the provisions of the criminal statutes is not applicable; their provisions were intended merely for the convenience of proof. This certainly is my own impression.

POLLOCK, B.—I also think that this rule should be discharged. The statute points out the mode of proceeding, and it directs that the case is to be treated by the magistrate in the same way as though it were a hearing of an ordinary case with a view to a committal to trial. As regards the evidence taken before Mr. Vaughan:—this was taken in the presence of the prisoner, and I should have thought that it was receivable. But whether it was so or not, if there were other sufficient evidence, it may be disregarded. This is not like the case of the admission upon a trial of improper evidence upon which a jury may have acted. This was only a preliminary inquiry, and if the magistrate had sufficient materials we cannot question his decision.

Rule discharged.

Attorney for the applicant, *H. O. L. Bebb.*

Attorney for the Crown, *The Solicitor to the Treasury.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Tuesday, March 18, 1873.

(Present: The Right Hons. Sir JAMES W. COLVILE, Sir BARNES PEACOCK, Lord Justice MELLISH, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.)

REG. v. COOTE.

Depositions on oath of a prisoner—Admissibility in evidence—Criminating questions—Ignorantia juris—Caution to witness—11 & 12 Vict. c. 42, s. 18.

By an Act of the Quebec Legislature, certain officers called "Fire Marshalls" are appointed with power to inquire into the origin of fires in Quebec and Montreal and for that purpose to examine persons on oath. Upon an inquiry, held in pursuance of this statute, as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse and his depositions made at the inquiry before the Fire Marshalls were admitted as evidence against him.

Held (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada), that the depositions were properly admitted.

The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "Nemo tenetur seipsum accusare," but does not apply to answers given without objection, which are to be deemed voluntary.

The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed ("Ignorantia juris non excusat").

The statute (11 & 12 Vict. c. 42, s. 18), requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them.

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BY the Consolidated Statutes of Lower Canada, c. 77, s. 57, it is provided that when any person has been convicted of any felony at any criminal term of the Court of Queen's Bench, the court before which the case has been tried may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the judgment until such question has been considered and decided by the said Court of Queen's Bench. By sect. 58, the said court shall thereupon state in a case, to be signed by the presiding judge, the question or questions of law, with the special circumstances upon which the same have arisen.

The said Court of Queen's Bench shall have full power and authority at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein; and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment on the trial of which such question arose, or to avoid such judgment and order an entry to be made on the record, that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other criminal term of the court, if no judgment has before that term been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires.

The present appeal was from a judgment of the appeal side of the Court of Queen's Bench, for the Province of Quebec, Canada, on a case reserved for the court by Badgely, J., under the powers of the above statute, on the trial of the respondent for arson.

The case so reserved was as follows:—

"The prisoner, Edward Coote, was indicted for arson of a warehouse in his occupation, and belonging to Alexander Roy.

"The indictment contained four counts,—The first with intent to defraud the Scottish Provincial Insurance Company; second, to defraud the Royal Insurance Company; the third to defraud generally; and the fourth to injure generally; upon his plea of not guilty, he was tried before the Court of Queen's Bench, at the criminal term of the said court, holden by me at Montreal, in this present month, before a competent jury, empanelled in the usual manner and, after evidence adduced by the Crown and by the prisoner, was found guilty, the jury returning a general verdict of guilty.

"In the course of the adduction of the evidence for the Crown, two depositions made and sworn to by the prisoner, with his signature subscribed to each, taken by the Fire Commissioners at their investigation into the cause and origin of the fire at his warehouse, before any charge or accusation against him or any other person had been made, were produced in evidence against him, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection

previously made by the prisoner to their production in evidence, and after his said objection had been overruled by me—after the conviction of the prisoner, and before sentence was pronounced by me thereon, he moved the Court by two motions filed in Court in the terms following :”

The case then set out the two motions, of which the first is immaterial, as Badgley, J., rejected it, and reserved no question respecting it; the second was in the following terms :

“Motion on behalf of the said Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside, and the said defendant, to wit the said Edward Coote, be relieved therefrom, for, among others, the following reasons :”

Twenty-one reasons were then set out, the only ones material to the present appeal being in effect that the two depositions were inadmissible in evidence, because the said Fire Commissioners, before whom they were taken, had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath.

The case then stated the rejection of the first motion, and that he, the said judge, though himself considering the reasons given insufficient to support the second motion, yet as doubts might be held by the Court of Queen’s Bench as to the legal production of the said depositions, reserved it, and held it over for decision with reference to the admission of the said depositions by the Court of Queen’s Bench, appeal side.

The Fire Commissioners, before whom the depositions were taken, are appointed under the provisions of two statutes of the provincial legislature of Quebec (31 Vict. c. 32, and 32 Vict. c. 29), under which Acts they are empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

The criminal law of England was introduced into Lower Canada at the time of the cession to the English, A.D. 1763, and the criminal law of England of that date still continues in force in the province of Quebec, Canada, except as it has been altered by Canadian statutes or imperial statutes applicable to Canada.

Previous to the year 1869 a statutable provision (Consolidated Statutes of Lower Canada, c. 77, s. 63) was in force, by which a power was vested in the Court of Queen’s Bench, appeal side, if at the hearing of a case reserved they were of opinion that the conviction was bad, for some cause not depending on the merits of the case, to declare the same by its judgment, and direct that the party convicted should be tried again as if no trial had been had in such case; but by a subsequent statute (32 & 33 Vict.

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c. 29, s. 80), passed by the Legislature of the Dominion of Canada shortly after the establishment of that confederation, for the purpose of assimilating the criminal procedure throughout the various provinces of the Dominion, that section was expressly repealed, and there were at the time of the respondent's trial statutable provisions giving right to a new trial in criminal matters, or regulating motions in arrest of judgment in criminal proceedings in force in the Province of Quebec, Canada.

On the 15th day of December, 1871, the reserved case came on for argument in the Court of Queen's Bench, appeal side, before Duval, C.J., and Caron, Drummond, Badgley, and Monk, JJ., and on the 15th day of March, 1872, the Court gave judgment in the following terms: "After hearing counsel as well on behalf of the prisoner as for the Crown, and due deliberation had, on the case transmitted to this Court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered, adjudged, and finally determined by the Court now here, pursuant to the statute in that behalf, that an entry be made on the record to the effect that in the opinion of this Court the production of the depositions made by the prisoner before the Fire Commissioners at Montreal was illegal, and, therefore, that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set aside.

"But this court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case, and that for the purpose of standing such new trial, he be bound over in sufficient recognizance to appear on the first day of the next ensuing term of the Court of Queen's Bench, sitting on the Crown side, at Montreal, and thereafter from day to day until duly discharged."

From this judgment Badgley and Monk, JJ., dissented.

On the 15th day of March, 1872, an application was made by the Attorney-General for the Province of Quebec, Canada, on behalf of the Crown, to the said Court of Queen's Bench, for leave to appeal to Her Majesty in Her Privy Council, and such leave was refused.

On the 10th day of May, 1872, special leave was granted by Her Majesty in Council to appeal from the said judgment of the said Court of Queen's Bench of the 15th day of March, 1872.

Sir *John B. Karlake*, Q.C. and *Bompas* for the appellant.—The depositions were properly received in evidence by the judge before whom the indictment was tried. They were admissible although made on oath, and although made by the prisoner as a witness whose attendance might have been compelled. At the time the depositions were taken no charge had been made against the prisoner, and he had the right of refusing to answer questions tending to criminate him. The prisoner answered

voluntarily, and Badgley, J., states that he "frequently exercised his privilege of refusing to answer certain questions." It was not necessary that the Fire Commissioners should caution the prisoner that statements made by him on the inquiry might be used in evidence against him. The statute (11 & 12 Vict. c. 42, s. 19) relates only to proceedings before magistrates, and caution given to accused persons. There was no ground for moving in arrest of judgment; nor had the court power to grant a new trial, for the statute empowering the court to grant a new trial (Consolidated Statutes of Lower Canada, c. 77, s. 57) was repealed by 32 & 33 Vict. c. 29, s. 80, which gives no such power. They cited the authorities given in the judgment *post*, and further, 1 Taylor on Evidence, 743; Rosc. Crim. Evidence, 62; Joy on Confessions, 62, 68; *Reg. v. Gillis* (17 Ir. C. L. Rep. 512).

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Judgment was delivered by Sir ROBERT P. COLLIER.—Edward Coote, the respondent, was convicted of arson, subject to a question of law reserved by Badgley, J. (the judge who presided at the trial), for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 87, sect. 57 of the Consolidated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read as evidence against the prisoner depositions made by him under the following circumstances:—An Act of the Quebec Legislature appointed officers named "Fire Marshalls" for Quebec and Montreal respectively, with power to inquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any judge of session, recorder, or coroner, to summon before him and examine upon oath all persons whom he deems capable of giving information or evidence touching or concerning such fire." These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the peace. Upon an inquiry held in pursuance of this statute as to the origin of a fire in a warehouse, of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the record, but their Lordships accept the following statement of Badgley, J., as to the circumstances under which they were taken: "Among the several persons examined respecting that fire was Coote himself, upon two occasions at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of

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the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises and duly committal for trial." At his trial the above-mentioned depositions were duly proved, and admitted in evidence after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a court as that of the Fire Marshall was beyond the power of the provincial legislature, and that consequently the depositions were illegally taken. Subsequently other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole court (in their Lordships' opinion rightly), that the constitution of the court of the Fire Marshall, with the powers given to it, was within the competency of the provincial legislature; but it was further held by a majority of the court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be given in evidence against him, after the manner in which justices of the peace are required to caution accused persons, by an Act of the British Parliament adopted in this respect by the Colonial Legislature. The court held the conviction to be bad, but inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial. Their Lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a prisoner of statements made by him upon oath is so unsettled that every judge is at liberty in every case to act upon his own individual opinion. It is true that doubts have from time to time arisen on this subject, and that conflicting *dicta*, and indeed, decisions, may be found upon it; but, in their Lordships' opinions, all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new laws, but declaring what the law has always been if properly understood. In the case of *Rex v. Haworth* (4 C. & P. 254), a deposition on oath made by the prisoner as a witness against a person named Sheard, on a charge of forgery, was received in evidence by Park, J., against the prisoner, on an indictment of forgery. In *Reg. v. Goldshede and another* (1 C. & K. 657), Denman, J., admitted against the defendants, on a charge of conspiracy, answers which they had made an oath in a suit in Chancery. In *Reg. v. Sloggett* (Dear. C. C. 656), the prisoner was examined in the Court of Bankruptcy, under an adjudication against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the commissioner to consider himself in custody. On a case reserved, it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case, Jervis, C.J., observes: "The test is whether he may object to answer. If he

may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg. v. Chidley and Cummins* (8 Cox C. C. 365), Cockburn, C.J., admitted a deposition made by Cummins, when Chidley alone was accused of the offence for which they were afterwards both tried. The learned editor of the 4th edition of Russell on Crimes (vol. 3, p. 418), thus reports a case of *Reg. v. Sarah Chesham*: "Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion. No charge had at that time been made against her. She made a statement on oath, which the coroner took down in writing. Campbell, C.J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed." The case of *Reg. v. Garbett* (Den. C. C. 236), accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held by a majority of the judges on a Crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible. The case of *Reg. v. Scott* (D. & B. C. C. 47), seems to go somewhat further. It was there held by the Court of Criminal Appeal (Coleridge, J., dissenting), that although, under the Bankruptcy Act then in force (12 & 13 Vict. c. 106), the bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the improper exercise of judicial authority. From these cases, to which others might be added, it results, in their Lordships' opinion that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principal *Nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed voluntary. The Chief Justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer criminating questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known more, he would or would not have refused to answer

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certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognised as essential to the administration of the criminal law, *Ignorantia juris non excusat*. With respect to the objection that Coote when a witness should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned (a question said by Badgley, J., not to have been reserved, but which is treated as reserved by the court), it is enough to say that the caution is by the terms of the statutes applicable to accused persons only, and has no application whatever to witnesses. If, indeed, the Fire Marshall had exercised the power which he possessed of arresting Coote on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been received. A question has been raised on the part of the Crown whether or not the court had the power of ordering a new trial, inasmuch as c. 77, s. 63, of the Consolidated Statutes of Canada, giving the court power to direct a new trial, has been repealed by the subsequent statute 32 & 33 Vict. c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the case it becomes unnecessary to determine this question. For the reasons above given their Lordships will humbly advise Her Majesty that the order made by the Court of Queen's Bench be reversed, that the conviction be affirmed, and that the said Court of Queen's Bench be directed to cause the proper sentence to be passed thereon.

Judgment reversed.

Attorneys for the appellant, *Bischoff, Bompas, and Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Thursday, June 19, 1873.

(Present: The Right Hons. Sir JAMES W. COLVILE, Sir ROBERT J. PHILLIMORE, Sir BARNES PEACOCK, Lord Justice MELLISH, and Sir MONTAGUE E. SMITH.)

ATTORNEY-GENERAL OF HONG KONG v. KWOK-A-SING.

Extradition—Habeas Corpus Act (31 Car. 2, c. 2), s. 6—Hong Kong Ordinance, No. 2, of 1850—"Crime or offence against the laws of China."

By an ordinance of Hong Kong (No. 2 of 1850) it is enacted that magistrates may issue warrants for the apprehension of Chinese subjects in the colony charged with "any crime or offence against the laws of China," and the magistrate may, on ascertaining probable cause for the charge, commit such persons until the gaoler shall receive orders from the Governor relative to further detention, or to transmission of such persons to the Chinese authorities.

Held (affirming the judgment of the Supreme Court, Hong Kong):

(1) That the words "crime or offence" in the above ordinance must be confined to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China: (2) that murder by a subject of China of a person not a subject of China, committed outside Chinese territory, was not a crime against the laws of China within the meaning of the ordinance; (3) that, there being sufficient primâ facie evidence before the magistrate that the respondent had committed an act of piracy jure gentium to justify his committal for trial, it was the duty of the magistrate to have committed him for trial at Hong Kong; and that a warrant by which the magistrate authorised the Governor, if he thought fit, to deliver the respondent to the Chinese authorities, was illegal, and beyond the jurisdiction of the magistrate.

The respondent, under a writ of habeas corpus, was ordered by the Supreme Court of Hong Kong to be released from custody, on the ground that he was detained under an illegal warrant on a charge of piracy and murder. He was again arrested on a charge of piracy jure gentium, and was again discharged by the said court under a writ of habeas corpus:

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Held (reversing the judgment of the Supreme Court, Hong Kong), that the second arrest was not a violation of sect. 6 of the Habeas Corpus Act: (31 Car. 2, c. 2).

THIS was an appeal from two judgments and orders of the Supreme Court for the Colony of Hong Kong.

The facts of the case are fully stated in the judgment, *post*.

The *Attorney-General* (Sir J. D. Coleridge, Q.C.), the *Solicitor-General* (Sir G. Jessell, Q.C.), and *Bowen*, for the appellant.

Fitzjames Stephen, Q.C. and *Stone*, for the respondent. They referred to *Reg. v. Tirnan* (10 L. T. Rep. N. S. 499; 33 L. J. 201, Mag. Cas.); *Reg. v. Bertrand* (16 L. T. Rep. N. S. 752; L. Rep. 1 Priv. Co. 520); *Reg. v. Windsor* (12 L. T. Rep. N. S. 307; 34 L. J. 186, Mag. Cas.); *Reg. v. Sawyer* (2 C. & K. 101); *Reg. v. Azzopardi* (1 C. & K. 203); *Speaker of Legislative Assembly of Victoria v. Glass* (24 L. T. Rep. N. S. 317; L. Rep. 3 Priv. Co. 560); *Re Anderson* (20 Upper Can. Rep. Q. B. 124); *Phillimore's International Law*, vol. 4, p. 707; *Forsyth's Case and Opinions on Constitutional Law*, p. 229; 33 & 34 Vict. c. 52; Ordinance of Hong Kong, No. 2, of 1850.

Judgment was delivered by Lord Justice MELLISH.—This is an appeal by the Attorney-General of the Colony of Hong Kong from a judgment of the Supreme Court of that colony whereby the respondent, Kwok-a-Sing, a Chinese coolie, who had been brought before the court by a writ of *habeas corpus*, was ordered to be released from custody, and an order made thereon, dated the 18th day of April, 1871, and also from a judgment and order of the same court, dated the 22nd day of May, 1871, whereby he was again ordered to be released from custody. The first writ of *habeas corpus* was issued on the 7th day of February, 1871, and was directed to the keeper of the gaol at Victoria, Hong Kong. The return to the writ was dated the same day, and set out a warrant of a police magistrate, which was as follows:—"Whereas the above-mentioned defendant was on this date duly convicted before Charles May, Esquire, one of Her Majesty's justices of the peace for the said colony, for that a communication having been received requiring the rendition of the defendant on behalf of the Chinese Government, as a subject of China, who has committed certain crimes and offences against the laws of China by participating in the murder of a portion of the crew of the French ship *Nouvelle Pénélope*, and it appearing to me, upon investigation of the case, that there is cause to believe that the said defendant is a subject of China, and has committed the said crimes against the laws of China by feloniously seizing the said ship at sea, and by murdering the captain and certain of the crew of the said ship on the 4th day of October last past at sea; and, further, that after the commission of the said crime, did feloniously seize a boat belonging to the said ship, and land at a place called Pakha, in Chinese territory, on the 11th day of

October aforesaid, and it was thereupon adjudged that the said defendant, for the said offence, should be committed to gaol for detention pending the receipt of orders from His Excellency the Lieutenant-Governor as to his future disposal. These are therefore to command you, the said constable, to take the said defendant and safely to convey to the said gaol, and there to deliver him to the said superintendent or keeper, together with this precept; and I do hereby command you, the said superintendent or keeper, to receive the said defendant into your custody in the said gaol, and there to imprison him as aforesaid. Given under my hand and seal at Victoria aforesaid, this 7th day of February, 1871. (Signed) C. May, Police Magistrate. (L.S.)”

This warrant was issued under an ordinance of the colony, No. 2, of 1850. By the 9th article of the Supplementary Treaty of Nankin, dated the 8th day of October, 1843, called the Treaty of the Bogue, it was agreed that if lawless natives of China, having committed crimes or offences against their own government, shall flee to Hong Kong, a communication shall be made to the proper English officer that the said criminals and offenders may be seized, and on proof or admission of their guilt be delivered up. Ordinance No. 2, of 1850, was passed by the Legislative Council of the colony, and the material parts were as follows:—“Whereas, by the treaties between Great Britain and China, provision is made for the rendition for trial to officers of their own country of such subjects of China as have committed crimes or offences against their own government, and afterwards taken refuge in Hong Kong. 1. Be it therefore enacted and ordained by his Excellency the Governor of Hong Kong, with the advice of the Legislative Council thereof, that if any complaint or information or any communication by any officer of the Chinese Government be made or forwarded to any magistrate or court (other than the Supreme Court) desiring the arrest of any person, being a Chinese subject, and then within the said colony of Hong Kong, and alleging that such person has committed, or is charged with having committed, any crime or offence against the laws of China, or if it shall appear in the course of any investigation before such magistrate or court that any person, being a subject of China, has committed any such crime or offence, it shall and may be lawful for such magistrate or court to issue a summons or warrant for the appearance or apprehension of such person; or, if such person be already in custody, it shall be lawful to detain such person, and to investigate the alleged crime or offence in the same manner as if such person were charged with a crime or indictable offence committed within the said colony. 3. And be it further enacted and ordained, that if at the close of the said investigation it shall appear to the said magistrate or court that such person as aforesaid is a subject of China, and that there is probable cause for believing that the said person has committed such crime or offence, it shall and may be lawful for such magistrate or court to commit such person for safe

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custody to prison, and to direct the gaoler to detain such person in prison until the said gaoler shall receive some order or orders from the Governor of Hong Kong relative to the further detention, discharge, or transmission of such person to the nearest Chinese authorities, or to such other Chinese authorities as to the said Governor shall seem fit; and the said magistrate or court shall, upon making such committal as aforesaid, transmit to the said Governor of Hong Kong the minutes of such investigation, and all documents in his or its possession, connected with the charge against such person, in order that such person may be dealt with according to the treaties aforesaid." By the Treaty of Tientsin, made the 29th day of June, 1858, new provisions were made with regard to the extradition of criminals from the colony of Hong Kong to the Chinese Government in substitution of those of the Treaty of the Bogue, which was abrogated. The depositions taken before the magistrates, and the documents before him having reference to the committal of Kwok-a-Sing, were afterwards brought before the Supreme Court in obedience to a writ of *certiorari*. The depositions contained the evidence of Wong Akee and Chun Assan, two Chinese who had been passengers, and of Paul Verret and Joseph Simon, two Frenchmen who had been seamen on board the French ship *Nouvelle Pénélope*, which left Macao on the 1st day of October, 1870, with 310 Chinese coolies on board, on a voyage to Peru. All the coolies were examined by the Portuguese authorities at Macao before they embarked, to ascertain if they went voluntarily, but, nevertheless Wong Akee said that he was kidnapped, which he explained to mean that he had been persuaded by a fraud to go to the barracoon, and that he told the authorities he was willing to go to Peru, contrary to the truth, because, from the threats of the Chinese who brought him there, he was afraid that his head would be cut off if he did not. It was also proved that about 100 of the other coolies said that they were kidnapped. There was no proof that Kwok-a-Sing had been kidnapped, or that he was among those who said they had been kidnapped. The master of the ship and the charterer selected eight of the coolies to be headmen over the others, and paid them three dollars apiece a month for acting as headmen. Kwok-a-Sing was one of those selected. At half-past 4 on the afternoon of the 4th day of October, when the ship was prosecuting her voyage on the high seas, about twenty of the coolies collected near a seaman, who was keeping guard at a barrier that was placed across the deck, attacked him and threw him overboard. They afterwards attacked the captain, who was walking unarmed on the deck, killed him, and threw him overboard. They also killed several others of the crew, and obtained complete command of the vessel, and changed her course to the coast of China. It was positively sworn by Chun Assan that Kwok-a-Sing was one of those who attacked the captain, and the other witnesses prove that he was one of the coolies who

kept the command of the vessel until the vessel arrived back on the coast of China, there was also some evidence that Kwok-a-Sing and other coolies took possession of the captain's watch and a quantity of dollars on board. When the ship arrived on the coast of China, Kwok-a-Sing and other coolies left the vessel in a boat. The vessel itself was run aground, and was left to be plundered by the natives. Among the documents returned by the magistrate to the Supreme Court was the following letter from the Colonial Secretary to the magistrate:—"Hong Kong, No. 53. Received 3rd Feb. Colonial Secretary's Office, 3rd Feb. 1871. Sir,—I have the honour to acquaint you, by desire of his Excellency the Lieutenant-Governor, that an application has been received from Her Majesty's consul at Canton, claiming, on behalf of the Chinese authorities, the rendition of the man 'Aping,' who is charged with participation in the murder of a portion of the crew of the French ship *Nouvelle Pénélope*. I have, &c., (Signed) J. Gardiner Austin, Colonial Secretary. C. May, Esq., First Police Magistrate." Several objections were made to the validity of the return, and were argued before the Chief Justice. He delivered judgment on the 29th day of March, 1871, and held several of the objections to be valid, and afterwards, on the 18th day of April, ordered Kwok-a-Sing to be discharged. On the 26th day of April, 1871, the Attorney-General caused Kwok-a-Sing to be again arrested on a charge of piracy *jure gentium*, with a view to his trial on that charge before the Supreme Court of Hong Kong. The evidence of witnesses was again taken, and Kwok-a-Sing was committed for trial. Another writ of *habeas corpus* was issued, and return made setting out the magistrate's warrant by which he was committed to take his trial. On the 22nd day of May, 1871, he was again ordered to be discharged, upon the ground that his second arrest was a violation of the 6th section of the Habeas Corpus Act. The first question which their Lordships will consider is whether, assuming that there was sufficient *prima facie* evidence against Kwok-a-Sing to prove that he was guilty of the murder of the French captain, and that he was guilty of piracy *jure gentium* in running away with the French vessel, these acts constitute crimes and offences against the law of China within the meaning of the first section of Ordinance No. 2 of 1850, or crimes and offences against the Government of China within the preamble of the same ordinance. There is no doubt that the extreme generality of the words "crimes and offences against the law of China," makes their construction very difficult. They cannot be intended to mean that every Chinese subject who is proved to have done something which the law of China makes a crime or an offence, is to be given up to the Chinese Government. If this were the meaning of the words, every Chinese who had done something which the law of China treats as a political offence, or who had done anything which the law of China treats as criminal, though the law of all European

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countries treats it as innocent, might be given up. Some limitation, therefore, must be put upon the meaning of the words, and their Lordships think that, in determining what that limitation is to be, they ought to bear in mind the position of the colony of Hong Kong with reference to China. There was, when the treaty was made, a manifest risk that the colony of Hong Kong might become the refuge of the criminal classes of the city of Canton and other Chinese towns, and it was impossible that the Colonial Government could punish Chinese subjects for acts committed within the territory of China. Having regard to this object, their Lordships think that the words crimes and offences ought to be confined to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China. In the Treaty of Tientsin, the persons to be delivered up are described generally as criminals. All ordinary crimes—such as murder, robbery, theft, arson—committed by a Chinese within Chinese territory, or in Chinese ships on the high seas, would be within the meaning of the ordinance. Their Lordships are also of opinion that piracy, at least in certain circumstances, would be within the meaning of the ordinance. They think it may properly be assumed, without proof, that China has laws to punish piracy on her own coast, and if it was proved that a subject of China, who had taken refuge in Hong Kong, was a pirate in this sense, that he was a person who went from the Chinese coast to plunder ships at sea, returning with his plunder again to China, they are of opinion that such a person might be given up under the ordinance. On a claim for the rendition of such criminals as these, it would not, in their Lordships' opinion, be necessary to produce the evidence of experts to prove what is the law of China. Their Lordships have now to consider whether there was evidence that Kwok-a-Sing had been guilty of crimes against the laws of China within the meaning of the ordinance. He is accused of two crimes, murder and piracy. The alleged murder was the murder of a Frenchman on board a French ship in which Kwok-a-Sing was a passenger on the high seas. They have, therefore, to consider, whether murder by a subject of China of a person who is not a subject of China, committed outside the Chinese territory, is a crime against the laws of China within the meaning of the ordinance; and they are of opinion that it is not. Their Lordships cannot assume, without evidence, that China has laws by which a Chinese subject can be punished for murdering beyond the boundary of the Chinese territory a person not a subject of China. Up to a comparatively late period England had no such laws. Moreover, although any nation may make laws to punish its own subjects for offences committed outside its own territory, still, in their Lordships' opinion, the general principle of criminal jurisprudence is that the quality of the act done depends on the law of the place where it is done. Now, the law as to what constitutes murder differs in different places. Suppose that a subject of

China kills an Englishman within English territory, or on board an English ship, under circumstances which, according to English law, might amount to manslaughter only, could it possibly be right for the English Government to surrender such a person to the Chinese Government to be tried according to Chinese law, to which the distinctions between murder and manslaughter may be wholly unknown? On the whole, therefore, on these two grounds—first, that it cannot be assumed without evidence that there is any law in China to punish a Chinese subject for a murder committed upon a foreigner within foreign territories; and, secondly, because even if it could be assumed that there was such a law, still this offence having been committed within French territory ought to be treated as an offence against French law, and not as an offence against Chinese law, their Lordships are of opinion that there was no evidence before the magistrate that Kwok-a-Sing, in murdering the French captain, committed an offence against the laws of China according to the true construction of the Ordinance. Their Lordships have next to consider whether there was sufficient evidence before the magistrates that Kwok-a-Sing had committed an act of piracy *jure gentium*, and, if there was such evidence, whether that would make his imprisonment, for the purpose of being delivered to the Chinese authorities, lawful. Now, their Lordships are of opinion that there was before the magistrate sufficient *prima facie* evidence that Kwok-a-Sing had committed an act of piracy *jure gentium* to justify his committal for trial for that offence at Hong-Kong. They see no reason to doubt that the charge of Sir Charles Hedges, Judge of the High Court of Admiralty, to the grand jury, as reported in the case of *Nix v. Dawson* (13 State Trials, 654), and which was made in the presence, and with the approval, of Chief Justice Holt, and several other Common Law judges, contains a correct exposition of the law as to what constitutes piracy *jure gentium*. He there says, "Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." Of course, there can be no difference between mariners and passengers, and there was unquestionably evidence that Kwok-a-Sing was a party to violently dispossessing the master and carrying away the ship itself and the goods therein; and the only question can be whether there was sufficient evidence that the act was done with a felonious, that is, a piratical, intention. In their Lordships' opinion, there was evidence of such an intention on the part of Kwok-a-Sing fit to be left to a jury, though they wish to be understood as giving no opinion which way a jury ought to find on this question. Next, it must be considered what was the legal duty of the magistrate when he had received the evidence; ought he to have

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signed a warrant enabling the Governor to deliver Kwok-a-Sing to the Chinese authorities, to be tried for both murder and piracy, or ought he to have committed him to be tried for the piracy at Hong Kong? In their opinion, he ought to have committed him to be tried for the piracy at Hong Kong. They think that the acts of piracy *jure gentium* with which Kwok-a-Sing was charged may be plainly distinguished from those acts of piracy which they have before stated to be, in their opinion, within the Ordinance and the Treaties. If Chinese subjects starting from, and returning to, Chinese territory, attack a ship of some other nation, whether in harbour or at sea, they, making that territory, as it were, the base of their operations, must be held to commit an offence against the municipal law of China and against the Chinese Government, whether they commit an act of piracy *jure gentium* or not; but if Kwok-a-Sing committed an offence against the municipal law of any nation he committed an offence against the municipal law of France, to which he was subject at the time, and not against the municipal law of China, and if he is punishable by the law of China, he is only so punishable because he has committed an act of piracy which, *jure gentium*, is justiciable everywhere. They are of opinion that such an offence is not an offence against the law of China within the meaning of the Ordinance. On the whole, therefore, they are of opinion that the warrant by which the magistrate authorised the Governor, if he thought fit, to deliver Kwok-a-Sing to the Chinese authorities to be tried by them for murder and piracy, was an illegal warrant, and one beyond his jurisdiction, and that, therefore, the first order of the Chief Justice for the release of Kwok-a-Sing was right, and ought to be affirmed. Having come to this conclusion, their Lordships need not give any opinion upon the validity of the other grounds on which the Chief Justice thought that Kwok-a-Sing ought, on the first occasion, to be discharged. They think, however, it is right to state that they do not agree with the Chief Justice that the evidence before him proved that *La Nouvelle Pénélope* was a slave-ship, and that Kwok-a-Sing and the other coolies who acted with him were justified in killing the captain and the French sailors, for the purpose of obtaining their liberty. There was evidence from which it might be inferred that some of the coolies had, by fraud or by threats on the part of other Chinese, been induced to go to the barracoon, and embark on board the ship against their will. They appear, however, all to have professed to the Portuguese authorities at Macao that they were willing emigrants; and there was, in their Lordships' opinion, no sufficient evidence upon the depositions that either the Portuguese authorities at Macao, or the French captain and crew, were any parties to compelling any of the coolies to leave China against their will. Their Lordships have next to consider whether the judgment and order of the 22nd day of May, 1871, whereby Kwok-a-Sing was, for the second time, discharged from custody, was valid. He was discharged solely

upon the ground that he had been committed the second time for the same offence, contrary to the 6th section of the 31 Car. 2, c. 2. They cannot agree with the construction which the Chief Justice has put upon this section of the statute. The principal object of the section seems to have been to prevent persons who had been brought up on a writ of *habeas corpus*, and discharged on giving bail and entering into their own recognizance, from being again arrested for the same offence, and obliged to sue out a second writ of *habeas corpus*. This appears from the provision by which the person discharged may be again arrested by the order of the court wherein he shall be bound by recognizance to appear, or other court having jurisdiction of the cause. The words, "other court having jurisdiction of the cause," were probably added to meet the case of an indictment having been moved by *certiorari* from one court to another. They do not say, however, that the section may not also apply to cases where a prisoner is discharged unconditionally upon the ground that the warrant on which he is detained shows no valid cause for his detention. They think, however, it can only apply, when the second arrest is substantially for the same cause as the first, so that the return to the second writ of *habeas corpus* raises for the opinion of the court the same question with reference to the validity of the grounds of detention as the first. In the present case the second warrant is a warrant by which Kwok-a-Sing was committed to take his trial at Hong Kong for piracy *jure gentium*, and was, in their opinion, a valid warrant. They think he ought not to have been discharged from his custody under that valid warrant, because he had been previously discharged from an unlawful imprisonment.

Their Lordships will accordingly humbly recommend to Her Majesty that the judgments and orders of the Supreme Court of Hong Kong of the 29th day of March, 1871, and the 18th day of April, 1871, should be affirmed, and that the judgment and order of the 22nd day of May, 1871, should be reversed, and that there should be no costs of the appeal.

First judgment affirmed; second judgment reversed.

Attorney for the appellant, the *Queen's Proctor*.

Attorneys for the respondent, *Shaen, Roscoe, and Massey*.

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Monday, Nov. 17, 1873.

REG. v. ROBERTS.

Payment of costs of prosecution out of money found on prisoner—Prisoner adjudicated bankrupt before conviction — Right of Trustee in Bankruptcy to money found on prisoner—Act for Abolition of Forfeiture for Treason and Felony 1870 (33 & 34 Vict. c. 23) s. 3—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 17.

After the conviction of a prisoner for felony the Central Criminal Court made an order, under sect. 3 of 33 & 34 Vict. c. 23, for the payment of the costs of the prosecution out of the moneys found on the prisoner at the time of his apprehension.

The validity of this order being questioned by the trustee in bankruptcy of the prisoner's estate, on the ground that the prisoner had been adjudicated a bankrupt between the dates of his apprehension and conviction, and that on such adjudication all his property vested in the trustee :

Held, that the order was rightly made, the trustee, on adjudication of bankruptcy, taking the property of the bankrupt prisoner, subject to the possibility of the criminal court making the order in question.

Quære, whether such an order would be valid if the prisoner were adjudicated bankrupt in respect of an act of bankruptcy committed before his apprehension.

IN this case a rule *nisi* had been obtained, calling upon the justices of the Central Criminal Court to show cause why a writ of *certiorari* should not issue to remove into this court an order made at the general session of the delivery of the Queen's gaol of Newgate, holden on the 5th day of May, 1873, whereby it was ordered that the costs incurred in the prosecution of one William Alexander Roberts, for feloniously forging an order for the payment of 11,500*l.*, should be paid out of moneys found on Roberts upon his apprehension, as far as such moneys should extend.

From the affidavits filed in the matter, it appeared that Roberts was taken into custody on the 14th day of April, 1873, on a charge of having forged and altered a check for 11,500*l.* After several remands, he was finally committed for trial at the Central Criminal Court. On the 24th day of April he was adjudicated a bankrupt at the London Bankruptcy Court, and on the 8th day of May a

trustee of the bankrupt's estate was appointed. On the same day on which the trustee was appointed, but later on that day, Roberts was found guilty of felony at the Central Criminal Court, and sentenced to twelve years' penal servitude. On the 9th June an application was made, on the part of the prosecution, to the Central Criminal Court, for an order for the payment of the costs of the prosecution out of the moneys found upon the prisoner on his apprehension, and then taken from him, under sect. 3. of the Act for the Abolition of Forfeiture for Treason and Felony (33 & 34 Vict. c. 26), and the Court made the order asked for.

It did not appear when the act of bankruptcy was committed on which the prisoner was adjudicated a bankrupt.

Giffard, Q.C. and *Poland*, now showed cause against the rule.—Sect. 3 of the Act to abolish forfeitures for treason and felony, and to otherwise amend the law relating thereto (33 & 34 Vict. c. 23), provides that it shall be lawful for any court by which judgment shall be pronounced or recorded upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses incurred in or about the prosecution and conviction of the offence of which he shall be convicted, if to such court it shall seem fit so to do; and the payment of such costs or expenses, or any part thereof, may be ordered to be made by the court out of any moneys taken from such person on his apprehension. This section clearly gave the Central Criminal Court power to make the order now sought to be quashed.

Metcalf, Q.C. (with whom was *Graham*) was here called on to support the rule.—From the date of the adjudication of bankruptcy, *i.e.*, the 24th day of April, the prisoner was divested of all his property, which from that date became the property (1) of the registrar and (2) of the trustee. Sect. 17 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71) enacts that "until a trustee is appointed the registrar shall be the trustee for the purposes of this Act, and immediately upon the order of adjudication being made, the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." [BLACKBURN, J.—So far as any interest in the prisoner himself was concerned, he could not, by voluntarily assigning it, get rid of its liability under the Treason and Felony Act, and if that be so, I do not see how a compulsory assignment of his property under the Bankruptcy Act can make a difference.] The prisoner could up to the time of his conviction, dispose of his property as he liked. In *Whitaker v. Wisbey* (12 C. B. 44) it was held that an assignment of a felon's goods, *bonâ fide* made for a good consideration, after the commission day of the assizes, but before the day on which he was actually tried and convicted, will pass the property. At the time of the prisoner's apprehension the money was his, but subject to the right of the Central Criminal

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Court to make an order after his conviction, for the payment of the costs of the prosecution out of it. But before any such order is made the Bankruptcy Act steps in and vests all the property of the prisoner absolutely in the trustee; the prisoner, therefore, had no longer any property which the criminal court can lay hold of by its order. [BLACKBURN, J.—The trustee takes only that property which is the bankrupt's, and if that property is subject to any lien in favour of another person, the trustee must take it subject to that lien. QUAIN, J.—The Act says expressly that the court may order the costs to be paid out of whatever moneys are "taken from such person on his apprehension."] That must mean moneys belonging to him—not moneys belonging to another person which might be found on his person at the time of apprehension. [BLACKBURN, J.—Perhaps that is so. If the act of bankruptcy had taken place before the prisoner's apprehension, the point might be more doubtful; but that point does not arise in the present case.] The prisoner at the time of his apprehension was legal owner of the moneys, subject only to a contingency which might never arise. [BLACKBURN, J.—And the trustee holds them exactly as the bankrupt did. His right to them is neither greater nor less. Roberts held the moneys subject to the contingency of an order being made after his conviction for the payment of the costs of the prosecution out of them. After the bankruptcy the trustee held them subject to the same contingency.] Suppose the prisoner handed over to his attorney some of the money in his possession at the time of his apprehension, to pay the costs of his defence, could the criminal court, subsequently to his conviction, make an order on the attorney for the payment of the costs of the prosecution out of the same money? This would place attorneys in a very awkward position. [BLACKBURN, J.—I do not think that there is any likelihood that the court would make any order having such an effect as that.] In any case notice should have been given to the trustee to show cause why the cost of the proceedings should not be paid out of the moneys taken from the person of the bankrupt; and on this ground also it is submitted the order was wrong.

BLACKBURN, J.—In this case I think the rule should be discharged. I wish to guard against being supposed to say that simply because money is found on the person of a prisoner at the time of his apprehension, the criminal court may make an order for the payment of the costs of the prosecution out of it. I am inclined to think that if moneys belonging to someone else are found in his possession, *e.g.*, if the person arrested is a banker's clerk carrying a bag of gold to the bank, the banker who is the owner of the money would have a right to interfere in such a case against any order being made. I also wish to guard myself against being supposed to decide that if the prisoner was adjudicated bankrupt by reason of an act of bankruptcy committed before his arrest, the trustee might not have a right to intervene.

Nothing appears in the present case to raise this point. So far as appears, the prisoner at the time of his arrest was in possession of moneys which he might have disposed of in any way he pleased. Then sect. 3 of the Act for Abolishing Forfeitures for Treason and Felony provides that such moneys shall be subject to the power of the criminal court to make an order for the payment out of them of the costs of the prosecution. That power may be exercised by the court notwithstanding every effort which the prisoner may make, whilst *sui juris*, to make away with the moneys. In case of bankruptcy intervening—not a bankruptcy by reason of an act of bankruptcy antecedent to the arrest—the trustee takes what was the property of the bankrupt, and subject to all the rights of third parties previously existing. I think there did exist in the present case, at the time of the adjudication of bankruptcy, a vested right, or lien, or hold, by virtue of the statute, on the moneys found on the person of the prisoner at the time of his arrest, and that consequently the order was rightly made.

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QUAIN, J.—I am of the same opinion. Sect. 3 of 33 & 34 Vict. c. 23, expressly enacts that “the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from such person on his apprehension.” The facts of this case show that the moneys, out of which the order for paying the costs of the prosecution was made, were taken from the prisoner on his apprehension. The money, when so taken, became from that time liable to have an order made for the payment of the costs of the prosecution out of it. It has been argued that that liability was done away with by the subsequent bankruptcy of the prisoner—a bankruptcy taking place subsequently to the apprehension of the prisoner. I am of opinion that it was not, and that the property taken by the trustee was subject to whatever contingency it was subject to before the bankruptcy. Whatever lien or hold on the property existed before the bankruptcy cannot be affected by the bankruptcy in the slightest degree. It would be a very different thing, as observed by my brother Blackburn, to hold that the same would be the case as to the property of a stranger found on the prisoner at the time of his arrest. I think the rule should be discharged.

Rule discharged with costs.

Attorneys for the prosecution: *Humphreys and Morgan.*

Attorneys for the trustee: *Lewis and Lewis.*

COURT OF QUEEN'S BENCH.

Thursday, Jan. 15, 1874.

(Before BLACKBURN, J., QUAIN, J., and ARCHIBALD, J.)

REG. v. OASTLER.

Removal of Indictment into Queen's Bench by certiorari—Costs of prosecution—Whether necessary that prosecutor should be a "party grieved"—5 & 6 Will & M. c. 11, s. 3—16 & 17 Vict. c. 30, s. 5.

Sect. 5 of 16 & 17 Vict. c. 30, after reciting that "it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench," enacts "that whenever any writ of certiorari to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognizance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment," &c.

This enactment is general in its application, and renders it unnecessary that the prosecutor, in order to be entitled to the payment of his costs, should be the party "grieved or injured," as required by 5 & 6 Will. & M. c. 11, s. 3.

IN this case the defendant had been indicted for obstructing certain highways, and had been found guilty on certain counts of the indictment.

E. Clarke now moved to set aside a side bar rule which had been obtained on the part of the prosecution to tax the costs, on the ground that the prosecutor was not a "party grieved" within the meaning of sect. 3 of 5 & 6 Will. & M. c. 11, which provided that "if the defendant prosecuting such writs of *certiorari* be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tytheman, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them as officer or officers, to prose-

cute or present, which costs shall be taxed according to the course of the said court, and that the prosecutor, for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the said court for such his contempt; and that the said recognisance shall not be discharged till the costs so taxed shall be paid." [BLACKBURN, J.—Is there not a later statute dealing with the recognisances to be entered into where indictments are removed into this court by *certiorari*?] 16 & 17 Vict. c. 30, s. 5, enacts that "whenever any writ of *certiorari* to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs, incurred subsequent to the removal of such indictment; and, whenever any such writ of *certiorari* shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognisance (to be acknowledged in like manner as is now required in cases of writs of *certiorari*, awarded at the instance of a defendant) with the condition following, that is to say, that the said prosecutor shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs incurred subsequent to such removal." This statute must be read in connection with the former one, and does not do away with the condition that the prosecutor, in order to be entitled to his costs, should be the "party grieved." [BLACKBURN.—But you seek to make out that the latter enactment, which is perfectly general in its terms, is to be limited by the former.] The object of the latter statute was to give increased security for the payment of the costs of the prosecution, but not to entitle to payment a party who was not entitled previously. [BLACKBURN, J.—Sect. 5 of the latter Act begins with a recital that "It is expedient to make provision for further preventing the vexatious removal of indictments into the Court of Queen's Bench;" and the terms of the enactment apply to all such removals.] If the condition annexed by the old Act had been intended to be abolished, it would have been expressly repealed.

BLACKBURN, J.—I am clearly of opinion that the 5th sect. of 16 & 17 Vict. c. 30, applies to all removals of indictments into this court by *certiorari*. There will, therefore, be no rule.

. QUAIN and ARCHIBALD, JJ., concurred.

Rule refused.

Attorneys for defendant, *Ford and Lloyd*.

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COURT OF EXCHEQUER.

Jan. 27 and 28, 1874.

(Before KELLY, C.B., PIGOTT, B., and AMPHLETT, B.)

VAUGHTON AND ANOTHER *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Railway company—Common carriers—Loss of goods above 10l. in value—Goods not declared under sect. 1 of Carriers' Act—Felonious acts of company's servants—What sufficient evidence of in civil action—Difference in that respect in a criminal prosecution—Calling the suspected servant as witness—Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), sect. 8.

In an action against a railway company, as carriers for hire, for the loss of goods alleged to have arisen from the felonious act of the servants of the company, it is not necessary for the plaintiff, in order to prove the felony, under sect. 8 of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), to bring home the charge to any individual servant of the company in particular, or to produce such evidence of the fact as would be requisite on a criminal trial; it being sufficient for him to show it to be more probable that the felony was committed by some one or more of such servants than by anyone else; and the mere fact of the company's abstaining from calling the suspected servants as witnesses, in answer to the plaintiff's case, is sufficient to justify the case being left to the jury.

So held by the Court of Exchequer (Kelly, C.B., Pigott and Amphlett, BB.).

THIS was an action brought by the plaintiffs against the defendants as carriers for delay in the delivery of goods intrusted to them, and also (the goods not having been delivered at all) to recover the value of such goods, consisting of articles of jewellery. The defendants pleaded, *inter alia*, the Carriers' Act, and the absence of a declaration of the value of the goods being above 10l. at the time they were delivered to them to be carried; to which the plaintiffs replied, that the goods were lost by means of a felony committed by the defendants' servants.

The pleadings in the action were shortly as follows:—

The first count of the declaration charged that the plaintiffs delivered to the defendants, as being carriers of goods by rail-

way from Birmingham to Liverpool, certain goods of the plaintiffs to be by the defendants carried from Birmingham to Liverpool aforesaid, and there delivered for the plaintiffs within a reasonable time in that behalf for reward, &c.; that the defendants received the said goods, &c.; and a reasonable time for carrying and delivering the same elapsed, yet the defendants neglected for a long and unreasonable time in that behalf to carry and deliver the said goods, whereby the plaintiffs were deprived of the use of the said goods, and the same were diminished in value. By the second count the defendants were charged with having received as carriers for hire certain goods of the plaintiffs to be by the defendants taken care of, and safely and securely carried from Birmingham to Liverpool, and there delivered for the plaintiffs within a reasonable time in that behalf for reward; and a reasonable time for carrying and delivering the same elapsed, yet the defendants did not take care of and safely and securely carry and deliver the said goods for the plaintiffs, whereby the same were lost to the plaintiffs. The third count was in trover for a wrongful conversion by the defendants to their own use of the plaintiffs' goods—that is to say, gold rings, gold locket, gold pins, and gold seals. Claim 100*l*.

The defendants pleaded various pleas, as follows: First (to the first and second counts), denying the delivery by the plaintiffs and the receipt by the defendants of the said goods for the purposes and on the terms alleged; secondly (further to the same counts), denying the breaches therein alleged; thirdly (to the third count), not guilty; fourthly (further to the same count), that the goods were not the plaintiffs' goods; fifthly (as to the first and second counts), that the breaches of duty in those counts alleged were, by reason of loss by the defendants of the said goods, and that the said goods were articles and property of the description mentioned in sect. 1 of 1 Will. 4, c. 4 (the Carriers' Act), and were contained in a parcel which, with the goods therein contained, was delivered by the plaintiffs to the defendants as and being common carriers by land for hire, at a certain office or receiving house of the defendants, for the purpose of being by them, as such carriers, carried for hire in a public carriage, and the value of the said goods then exceeded the sum of 10*l*., and, at the time of the delivery of the said parcel and goods as aforesaid, there was affixed, in legible characters, in a public and conspicuous place of the said office or receiving house, being an office or receiving house of the defendants, where such parcels were then received by the defendants for the purpose of carriage, a notice, within the meaning of the said statute, whereby the defendants notified that an increased rate of charge in the said notice mentioned was required to be paid them, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of articles and property of the description in the first section of the statute mentioned, and at the time of the delivery of the said parcels and

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goods at the said office or receiving house of the defendants as aforesaid, the value and nature of the said goods were not declared by the person sending or delivering the same, and neither such increased charge as aforesaid nor any agreement to pay the same was accepted by the person receiving the said parcel and goods.

The plaintiffs took and joined issue on all the said pleas, and for a second replication to the said fifth plea, they said that the loss of the said goods arose from the felonious acts of servants in the employ of the defendants, and not otherwise; and upon that second replication issue was also joined.

The cause came on for trial at the last summer assizes, 1873, at Warwick, before Honyman, J., and a special jury, on which occasion the following appeared to be the facts, which were either proved in evidence or admitted.

The plaintiffs, who were wholesale jewellers carrying on business at Birmingham, sent from thence on the 29th day of January, 1873, a box of jewellery to their traveller, a Mr. Holland, then at Liverpool, and addressed to him at "Lawrence's Hotel, Liverpool," where he was then staying. The box contained articles of jewellery, &c., which were admitted to be of above the value of 10*l.*, and to be within the operation of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), but the nature and value of the contents of the box were not "declared" by the plaintiffs within the terms of sect. 1 of the Act, at the time it was handed by them to the defendants' servants at their Birmingham station, for carriage to Liverpool, although in the receipt which was given for it at that time by the defendants' servant, the package was stated to contain "jewellery." The delivering of the box by the plaintiffs to the defendants at Birmingham was not disputed by the latter, nor was there any question raised as to the nature and value of the contents, the only question at issue between the parties being whether (the box not having been delivered to the plaintiffs or to their traveller at Liverpool) its loss had been occasioned by the "*felonious acts of any servant of the company*" within the meaning of sect. 8 of the Carriers' Act above mentioned, which section is in the following words:—"Provided also, and be it further enacted, that nothing in this Act shall be deemed to protect any mail contractor, stage coach proprietor, or *other common carrier for hire* from liability to answer for loss or injury to any goods or articles whatsoever arising from the *felonious acts* of any coachman, guard, book-keeper, porter, or other servant in his or their employ. . . ."

On arriving at the defendants' Lime-street Station, at Liverpool, from Birmingham, parcels, such as was the box in question, are taken to the "parcel office" at the station for delivery in Liverpool. This office is not open to or accessible by the public, but only to the servants of the company. The parcels for delivery in Liverpool are entered in a book kept for the purpose, and are then put into a covered van, at the office door, to be driven away and delivered at their several destinations in the town. The

collection and delivery of these parcels from the defendants' station at Liverpool as undertaken by an agent of the company of the name of Thurston, under a contract with the defendants for that purpose, and the vans used by him in the business had his name, &c., painted on each of them, thus, "Joseph Thurston, agent for the London and North-Western Railway Company." A man called Hindley, in the employ of Thurston, was the driver of the parcel van on the morning in question (Jan. 30), and he had a book in which this box, together with two other parcels, also for delivery to other persons at Lawrence's Hotel, was duly entered. It was Hindley's duty to check the parcels off by this book as they were placed in his van, and on him rested the duty and responsibility of safely delivering them. There was no part of the defendants' station open or accessible to the public nearer the spot where the parcel van was, while the parcels were being placed in it, than from six to ten yards.

On arriving with his van at Lawrence's Hotel, Hindley went into the Hotel and delivered there the other two parcels above mentioned, and permitted the housekeeper to sign his book as having received three parcels, including the box in question, which she did, not adverting to the fact that only two had been delivered. The landlord, however, came in at the moment, and perceiving what Hindley had done, called his attention to it, and asked him where Mr. Holland's parcel was, to which Hindley replied, "Isn't it here?" and then went back to his van as if, apparently, to look for the parcel, and came back and said he could not find it, nor was it ever in fact delivered. The housekeeper's receipt for the box was then erased or struck through by her in Hindley's book.

On the 10th of February, 1873, some articles of jewellery, identified as having formed a portion of the contents of the plaintiffs' box, were discovered by a detective police officer to have been pledged a day or two previously at a pawnbroker's in Liverpool by a man named "Buchanan," who was not in the service of the company, and who was at once arrested on suspicion of having stolen the box. He denied the stealing, and said that he had found the articles which he had pawned lying about on a part of the defendant's station, called the "Fish Siding," which siding was open and accessible to the public, and was about 100 yards distant from the office where the parcels were put into the van. Upon going to the part of that siding pointed out by Buchanan, the police officer discovered some other broken bits of jewellery lying about, which proved to be portions of the plaintiffs' property, and also some bits of wood, which were identified as being parts of the box in which the goods were packed. The officer then went to the "Parcel office," where he saw a man of the name of "Wilson," one of the clerks employed by the defendants in, and having charge of that office, and Wilson then produced to the officer a breast-pin's head, which was identified as a portion of the lost goods, and which he said

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he had picked up on the siding some days before, and that another man had also picked up some other bits of the jewellery. He said also that he had not mentioned anything about it, not thinking it to be of any value. The man Buchanan was subsequently discharged, the police authorities being satisfied with his statement as to finding the articles.

At the close of the plaintiffs' case, the counsel for the defendants submitted that there was no evidence to go to the jury in support of the plaintiffs' second replication; there was no proof that any felony had been committed by anybody, and certainly none that it had been committed by any servant of the company. The defendants called no witnesses, and the learned judge in summing up to the jury, told them that they must, before they could find a verdict for the plaintiffs, be satisfied that the goods were stolen by the felony, not of one of the public, but of one or more of the company's servants, or (which was the same thing here) of Thurston's servants, although the plaintiffs might not be able to fix the felony on any one particular servant, nor was it necessary that the jury should be satisfied as to which one of two or more implicated servants was the actual thief.

The jury found a verdict for the plaintiffs on the first count, with nominal damages, and on the second count with 47*l.* damages, and leave was reserved to the defendants to move to set aside that verdict, and to enter a verdict for the defendant on the second count, on the ground that there was no evidence which ought to have been left to the jury in support of the replication to the fifth plea.

A rule to that effect, and also for a new trial on the ground that the verdict was against the weight of evidence, was accordingly moved for and obtained by *Field*, Q.C., on the part of the defendants, in Michaelmas Term last, and now.

Digby Seymour, Q.C., and *Forbes*, for the plaintiffs, showed cause against the rule, and contended that the plaintiffs were entitled to retain the verdict which had been found in their favour, and that the jury were well warranted in finding it, because it was sufficient for the plaintiffs to adduce in evidence, as they had done in this case, circumstances which threw a suspicion of a felonious act upon the servants of the railway company, and that the burden was thereby cast upon the defendants of calling these servants into the witness box to explain, if they could do so, their conduct in the matter. For that proposition the case of *Boyce v. Chapman* (2 Bing. N. C. 222), is an authority, in which in an action against carriers, upon an issue that the plaintiff's goods were stolen by the defendants' porter, the plaintiff proved only circumstances of suspicion, which probably would not have insured a conviction on an indictment for felony; but, the defendants having omitted to call the porter as a witness, and the jury having found for the plaintiff, the court refused to grant a rule. It is quite sufficient in a case like the present, if it be shown beyond reasonable doubt that the loss of the goods in

question must have resulted from a felonious act on the part of some one or other of the servants of the railway company, and it is not incumbent on the plaintiffs to fix by their evidence anyone servant in particular with the felonious act, nor even to adduce such distinct and precise proof of the act as would be held needful to establish a case for the jury, if one of the servants were on his trial on an indictment for the felony. They cited also *Machin v. The London and South-Western Railway Company* (2 Ex. 413, 848; 17 L. J. 271, Ex.), *Keys v. The Belfast Railway Company* (in the Irish Court of Common Pleas) (8 Ir. Com. L. Rep. 167.)

Field, Q.C., and *J. Carter*, for the defendants, supported their rule. — No evidence of a felony having been committed was adduced by the plaintiffs at the trial, which should have been done to justify the case being left to the jury. [KELLY, C.B.—There would probably not have been sufficient evidence to justify a judge, had it been a criminal trial, in leaving either Hindley's or Wilson's case alone to the jury; but, taking the two cases together, it might be different. PIGOTT, B.—The entry in Hindley's book is strong to show that he had possession of the box. The company do not appear to have followed up the matter very closely.] The burden of proof was upon the plaintiffs to show a felony by one of the company's servants, and they have not shown it. It has been laid down, and acted upon as law in many cases, that, in order to make a carrier liable under this section, and to take him out of the protection designed for him by the statute, it is necessary that a felony should be proved to have been committed, and that suspicion merely that such is the case is not sufficient. To that effect is the case in the Common Pleas of *The Great Northern Railway Company v. Rimell* (18 C. B. 575; s. c. nom. *The Great Western Railway Company v. Rimell*, 27 L. J. 201, C. P.), an authority. It was said by Willes, J., there, that in order to make out a *prima facie* case, the plaintiff must show not only that the theory of a felony having been committed by one of the company's servants is consistent with all the facts and probable, but also that there is some one substantial credible fact which is wholly inconsistent with a contrary theory. Now there is an entire want of that here. That case was followed shortly afterwards by another case to the same effect in the same court, of *Metcalf and another v. The London, Brighton, and South Coast Railway Company* (4 C. B., N. S., 311; 27 L. J. 333, C. P.), in which Williams (at p. 334 of 27 L. J.) said: "The plaintiffs are not entitled to recover unless they show affirmatively that the goods in question were lost by means of a felony committed by one of the company's servants." The case of *Boyce v. Chapman* (*ubi sup.*), relied on by the other side, is distinguishable, for the stolen goods had been found in the actual possession of a porter in that case; and, even if the court should not think it distinguishable, it ought not to be followed, not being reconcilable with the two later cases. As to the company's not having followed up the

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case with sufficient alacrity, the answer is that there was not sufficient evidence to justify them in doing so. By leaving an insufficient case in support of this replication to the jury the result will be, if the court should discharge this rule, that these two men, Hindley and Wilson, the servants implicated, will have the odium and suspicion of a criminal charge hanging over them for the rest of their lives; whereas, if they had been put in the dock on their trial for the felony, either jointly or separately, they would inevitably have been acquitted, and without the case being left to the jury. The plaintiffs here are seeking to obtain a criminal conviction by a civil procedure, and it would in effect be trying their men for a felony upon an entirely collateral inquiry; and that, it is submitted, would be quite opposed to the spirit and policy of the law, nor would it be less so to compel the defendants to put the men into the witness box. The object of the Carriers' Act was to protect the carrier, and this exception upon an exception should be read as much in his favour as possible. [Pigott, B., referring to the words of sect. 8, and the comments thereon of Cresswell, J., in *Rimell's case* (*ubi sup.*), where, at p. 205 of 27 L. J., C. P., that learned judge said, "a mere suspicion is not sufficient, it must be proved that the loss actually did arise by felony." KELLY, C.B.—As to the evidence bearing more hardly on the company's servants in a civil action than in a criminal trial, the answer is that the circumstances are different, the means of defence are different, and the legal principles to be applied are different. What may be very satisfactory evidence in the one case may be very unsatisfactory evidence in the other. It was open to the company to call both Hindley and Wilson as witnesses.] If that had been done, men practically on their trial for a criminal offence, would have been subject to cross examination.

KELLY, C.B.—I am not prepared to say, even if either of these men, Hindley or Wilson, had been indicted for felony in having stolen this box of jewellery, that there would have been evidence which a judge ought to have left to the jury in support of the prosecution. But, it appears to me, for reasons which I will presently mention, that a case of this nature is not to be dealt with at all on the same principle as that which governs the proceedings in a criminal prosecution. Let me take at once a supposed state of things, in which it would be perfectly manifest that one of two persons had abstracted, and, under the circumstances, it might be said, *feloniously* abstracted, a certain article, and yet the circumstances might be such that it would be impossible to say which of the two persons it was. Suppose, for instance, that a parcel had come into the possession of a railway company, and had arrived at one of its stations, to be forwarded thence the next day to some other station, and that in the meantime the company's servants had locked it up in a cupboard in the station office, of which cupboard each one of two servants of the company alone had a key, and that no other

person had any key or other means of access to the cupboard in question; and suppose that, in the interim between the parcel being so locked up overnight and the cupboard being opened in the morning, in order to take out the parcel and forward it to its destination, no other individual than these two persons had been upon the spot, or within the room in which the cupboard was, and that, on the cupboard being unlocked and opened in the morning, it was discovered that the parcel was not there, it would be certain to demonstration on proof of the above facts, that one or both of those two persons had taken away this parcel, and it would evidently be absolutely impossible to say which of the two it was. One of them might have been fast asleep in his bed during the whole time, and the other might have gotten up and taken the parcel from the cupboard. Can any one doubt that such a case would be within the intent and meaning of the statute that, where it is clear that the servant or servants of the company had stolen the parcel in question, the company should be liable? Let us just look at the section of the Act of Parliament which is applicable to this matter. The 8th section of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), is the section in question, and it exempts carriers from the general protection of the Act where the loss of the articles in question arises from the felonious acts of any servant in their employ. [His Lordship here read the section, and then proceeded as follows:] The intention of that section is manifestly to protect the public from loss or injury to their goods arising from the felonious act of any servant of the carriers or company, and to make the latter liable whenever the articles in question are stolen by persons under their control. Is it possible to say that such a case as the present does not come within that section? We must deal with cases arising under it on very different principles from those which are applicable to a case of a person indicted for a felony. In the latter case where the prisoner cannot give evidence or be examined, if evidence were given that the particular article had come into the prisoner's possession, and had been in his possession for a time, and had then disappeared, the bare fact of possession which might, consistently with the rest of the evidence given, lead to no other inference than that the party charged had been guilty of negligence, could not justify a judge in leaving the case to the jury at all. But is not the case very different here, where the company could have called all the servants in their employ who were at all suspected of being implicated in the matter to have explained the disappearance of the box, and anything in the circumstances that might really be deceptive? Here there is much circumstantial evidence against Hindley, from his having possession of the book, the parcels mentioned in which had been checked and looked over, and his being also in the exclusive possession of the van in which they were placed. The question then arises, whether there is any difference between a civil action, in which

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we have to consider whether the words of this Act of Parliament have been complied with or not, and the case of the same individual (Hindley), if he had been indicted for a felony. It might be no justification for a judge leaving such a case to a jury, had Hindley been indicted for the felony, that there was circumstantial evidence that he had had possession of the parcel, and that it had disappeared at the time when it was his duty to deliver it; but in a civil action like the present, it is surely no answer to say, in argument merely, that there was no case to go to the jury, because the man might never have had actual possession of the parcel, or if he had, that it might have been stolen from his van on the way to the hotel. The reply to such an argument is at once that Hindley might have gone into the witness box, the defendants might have called on him as a witness to prove that, although true it was that the parcel had come into his possession, yet that it might have been stolen from him on the way. It is an argument in favour of the plaintiff's case, that if Hindley were innocent, or if the parcel had not been feloniously stolen by "the servant or servants of the company," he might have been, and yet was not, called as a witness to prove all that. Now we have the very high authority of Tindall, C.J., in the case of *Boyce v. Chapman* (*ubi sup.*), that, in a case arising on this very Act of Parliament, the fact of its being in the power of the company "to call the party suspected, for the purpose of showing that the suspicion is unfounded, and proving his innocence, and their not doing so are circumstances that may well be taken into consideration, and that very fact is of itself evidence for the jury upon which, coupled with the other evidence, they may find their verdict;" and I see no reason why it should not be so. Mr. Carter, in his argument for the defendants, dwelt very ably upon the ill consequence that would ensue to a man's character from his being indirectly convicted of a felony by the verdict of a jury in a civil action, without that clear and distinct proof of guilt which is essential in a criminal prosecution. But the answer to that is that there is nothing unreasonable in saying that, if the company rely upon the integrity of their servants, and they have to answer a *prima facie* case which has been made out tending for the moment to throw suspicion on one or more of those servants, they have the power to call the servant or servants in question as witnesses. It was a fact connected with the other facts on which the jury would be justified in finding a verdict such as they have found in the present case. But now let us see what was the evidence here. First, with regard to the case of the man Hindley, with regard to whom the case is weaker than in the case of the other man, Wilson. It is perfectly clear from the evidence of the book, which, in effect, represents the matter in writing, that the box in question had, together with other packages, been put into this van to be conveyed from the defendants' railway station to the hotel

where the consignee of the box was staying; and that book was in the possession of Hindley. The fact that Hindley had taken upon himself the conduct of this van from the station to the hotel, and that he had possession of the book, which he, either alone or together with some one else, must have examined and checked with the different articles to be put into the van, would have been circumstances tending to show that at all events, the articles mentioned in the book must have been put into the van, and so must have come into Hindley's possession. Then it is said that that may well be, but that this box might have been stolen by some third person on its way to the hotel. That, however, is mere matter of conjecture, and something as to which there is no evidence. But we have the further evidence that, on arrival at the hotel, when and where it was Hindley's duty, and the responsibility was thrown upon him, to deliver the three parcels entered in the book, he delivered two only, and instead of saying, "There is a third parcel, I will go back and see what has become of it," he permitted the housekeeper to sign his book as if all three parcels, including the plaintiff's box, had been duly delivered. That would be evidence to go to the jury that there was something wrong, and that he was endeavouring to practise deception on the housekeeper, or on somebody in the hotel, which, taken together with the fact that he had his book and had checked the parcels when put into the van, may have satisfied the jury that he had got rid of the box in question in an unlawful way, and was endeavouring to cover his guilt by pretending to be delivering the whole, whereas he was delivering part only of the articles which he was bound to deliver. That is a case which, I think, if he had been put upon his trial for the felony, a judge would and ought to have left to the jury; but in a case like the present, even if the man himself had been the defendant, he would have had nothing to do but to walk into the witness-box, and account for the non-appearance of the package in question, and so justify himself before the jury; and in the case before us, where the railway company knew that it was Hindley's duty to deliver this parcel, and that there was evidence that it had come to his possession, nothing would have been easier than for them to have called him as a witness to have proved his innocence, and so to have got rid of that part of the charge in the replication. I think, therefore, on these grounds, that there was evidence against Hindley. But with regard to the case of the other man, Wilson, it does not appear to me to be open to any reasonable doubt, because he is found in possession of a part of the stolen property. I say "stolen," because some of the contents of the plaintiffs' box were found a few days afterwards to have been pawned at the shop of a pawnbroker in Liverpool. If the box had been merely mislaid, no such thing would have taken place. The man Wilson is a servant of the company, passing the greater part of his time upon their premises, and he

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is found in the actual possession of a portion of the articles which we must assume to have been stolen, and has given no account of them in evidence. Surely that, standing alone, would be evidence to go to a jury on the trial of the man of his having feloniously stolen the articles which he is found in possession of. I do not say that it is not evidence which might have been met and answered, and his character have been cleared from suspicion, by evidence that he might have given; and it was so very easy in this case to have given that evidence. He said that he found it on a part of the defendant's premises, and that some one else had found another portion of the contents of the box. How easy then, to have shown by evidence that other persons at the same time, and under the same circumstances, had found portions of the contents, and had taken them innocently, as something of no apparent value, as Wilson had done. With regard to Wilson, therefore, there really was evidence which, unexplained, tended to fix upon him the charge of felony, and was amply sufficient in itself to have been left to the jury in support of it. Under these circumstances, though the evidence may be slight, yet, upon the ground that it might have been met and answered, if no felony had been committed by any of the defendants' servants, by the company calling their servants, I am, taking all these facts together, clearly of opinion that there evidence to go to the jury in support of this replication.

PIGOTT, B.—I am also of the same opinion. The question here is, was there evidence to go to the jury in support of the replication? The replication is that the box was lost by the felonious act of some one or other of the company's servants. [The learned judge here read it.] I think the true view of the construction of the 8th section of the Carriers' Act, upon which the replication is founded, is that which was taken by the Court of Common Pleas in *Metcalf's case* (*ubi sup.*) which has been cited in argument before us. There the question was whether some of the servants had committed a felony. I do not understand that any court has ever taken the view that the plaintiff is bound to point to some one particular servant. I think it is enough if the evidence points to this, that a felony of the article in question has been committed, and that it is more consistent with the facts proved, and with probability, that it was committed by the servants of the company than by any other person. That I take to be the test which was put by Willes, J., in that case, whether there is or not evidence sufficient to go to the jury, and with that rule as so laid down I entirely agree. The question then for us is, was the evidence here more consistent with the theory that a felony had been committed by a servant of the company than that it had been committed by anybody else? It is perfectly clear that it was committed by some person. Nobody can doubt that the box was taken and broken open and the contents abstracted. Looking at the circumstances it could not have

been an accidental loss of the box. What is the evidence as to the time when, and the place from whence it is taken, both as to Wilson's possession and Hindley's conduct, as being consistent with their innocence with reference to the question when and where, and how this box could have been taken from the company's possession? It is clear that it was safe at Liverpool, at the end of the journey; that it was entered in the company's book for delivery in Liverpool; and that it was put into Hindley's book, who was the servant of Thurston, as an article for which he was accountable. Now, as to what happens upon the checking taking place, and the change of possession from the company's van to the cart of Thurston, the person who is for this purpose to be taken as a servant of the company, the evidence is left very bare indeed, and we can only judge of it from our knowledge of such things, and of the way in which business is ordinarily transacted. I understand it to be this, that when the goods are delivered at the goods office, they are called over and entered in the book of the person who has to deliver them, and his book is evidence against him that he has these goods to account for, as having received them. That being so, this box is an article given over into the possession of Hindley, Thurston's man. It seems that it was lost after Hindley had got possession of it. It was Hindley's duty to deliver it at the hotel. He takes his cart to the hotel, and there he does that which shows that he supposes, or that he was pretending to suppose, that he had got this box, because he induced the housekeeper there to sign his book as having received the box; and the fact of its not being there is only found out by the landlord coming in and pointing out to her that there ought to be three parcels, and asking where the third was, there being only two. Thereupon Hindley says, "Is it not there," which to my mind is a clear admission of his being accountable for it. I do not dwell on that as showing that he was implicated in the felony, but that he was accountable for the delivery of the box; and when it is suggested that it may have been lost from his cart whilst he was in the hotel, the answer is that it is not consistent with the fact of some stranger having stolen it at that time, that it is found out afterwards to have been broken open upon the company's premises, about 100 yards from the spot where the cart stood to receive the parcels for delivery. No man, having stolen it from the cart at the hotel door, would have come back with it into the very jaws of the lion. These facts seem to me to go to show that the box was abstracted from the company's possession at the time when it was passing, or just as it had passed from their booking office into Hindley's, or Thurston's cart. If so (and no evidence is called on the part of the defendants to disprove it), who could have had any opportunity of taking it at that time? It is not shown that any of the public could have gone into the parcels' office and taken it away, or could have gotten into the cart and taken it out without being seen, and it must be pre-

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sumed that nobody could have done so. That seems to me to bring the felonious abstraction to a point, both of place and time, which is more consistent with its having been stolen by one of the company's servants than by anybody else. Those servants had the opportunity of taking it, and nobody else had that I can imagine, so far as the proof goes. Then is it not in fact shown that the loss concurred after the article was given into Hindley's charge, and before his cart started on its journey from the doors of the Lime-street station? These facts, coupled with the subsequent finding of the pieces of the box and bits of the jewellery on the company's premises, and some of the property being actually found in the possession of one of the company's servants, throw the onus upon the defendants of explaining, more fully than was done at the trial, the conduct of these several servants of theirs with reference to the whole matter. If this evidence is not sufficient to call upon the company for an answer to or explanation of these facts, then I know not how circumstantial evidence can ever show that persons are implicated in such a transaction. On the whole, I come to the conclusion that there was evidence more consistent (and that is quite enough) with the felony having been committed by the defendants' servants than by anybody else.

AMPHLETT, B.—I am entirely of the same opinion. I think this case of very great importance both to railway companies and to the public, and I am sure that the court would not be doing its duty if they frittered away the protection given by the statute to railway companies with regard to property intrusted to their care for conveyance and delivery. But what we have to consider is, whether there was or not evidence to go to the jury of a felony committed by some one or more of the servants of the company; and I think that, in considering that question, it is impossible not to consider the circumstances of some importance. The evidence is left in a somewhat vague state, but the defendants had in their possession important evidence that was not brought forward; and I think that this was a case which ought to have been left to the jury. I can only say that I agree with my Lord Chief Baron as to whether, under the statute, it is necessary to show the actual servant that committed the felony. I entirely agree with his construction that, if it is shown beyond reasonable doubt that the felony was committed by some one of them, without being able to specify distinctly which of them, the case is taken away from the protection of the statute. Then let us apply that principle to the present case. I am free to confess that I do not see, with reference to the general question, that there is any sufficient proof that the felony which was committed was necessarily committed by some one of the servants of the company; because, independently of the special case against Hindley and Wilson, there does not seem to me to be sufficient evidence to show that one of the public might not have committed the felony. But we are driven to take the case not with

reference to the guilt of either of the men, but simply to the question whether there was or was not a question to be left to the jury with regard to their guilt, that is supposing the company, the defendants in this case, do not choose and have not chosen to produce any rebutting evidence at all, whether there was a case or not which the jury might consider with reference to the liability of the company. As to the facts of the case, I do not propose to go through them at all at length, but I will say a word or two with regard to both Hindley and Wilson. With regard to Hindley, I think myself that, if he were being tried at the bar, and the only evidence against him was the facts that have been proved in the present action, a judge would be bound not even to leave the question to the jury; and the case as regards Wilson, as it struck my mind (and such things strike different minds in different ways), appears to me, on the whole of the case, to rest on a different footing. I wish particularly to guard against saying that I have any suspicion in my own mind with regard to Wilson having been guilty of felony—that is not the question. If he were put to the bar, I do not suppose he would leave the case without explanation. The question would not be whether there would or not be a sufficient case for the jury to take into their consideration, but what would be the evidence there. The evidence would be that, a felony having been committed of this box of jewellery on the 30th of January, we must, I think, take it for granted that inquiries were immediately made with regard to the lost box, which must have been known to every one in the office of the company. We find then that a few days afterwards, on the Thursday before the 10th of February, Wilson, according to his own statement, found some of the stolen property, at least he found some pin heads, which appear to have been not of very great value, but of some value, and a companion of his found two more, and he says that he did not disclose the fact, or go to his employers about it until the police came and made inquiries upon the subject. I do not in the least say that Wilson might not have explained this fact. I do not say that the jury would convict even if he remained silent; but I do feel very strongly that if such a case had been made against Wilson, and he had given no further explanation about it, it would have been, as against him, a sufficient case to be left for the consideration of the jury. But, in the present case, nothing would have been easier than to have called Wilson as a witness, and as the learned judge said at the trial, it could not be expected for a moment that the plaintiff should have called him; and I think that that was an additional reason why the case was properly left for the consideration of the jury. An observation was made by Mr. Carter with regard to the destruction of character which might arise from finding a verdict for the plaintiff in a case like this, which struck me at first to be of very great importance. But I think the answer to it is that it is for the benefit of these very parties themselves that they

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should be put into the witness box and be enabled to give their explanation. I have no reason to believe that their evidence would not have been satisfactory. But, if there be no explanation given, I think the jury were right to take the case into their consideration, and that the case was, therefore, properly left to them.

Attorneys for the plaintiffs, *Burton, Yeates, and Hart*, 25, Chancery-lane, W.C.

Attorney for the defendants, *R. F. Roberts*, Euston Station, N.W.

CENTRAL CRIMINAL COURT.

Friday, June 13, 1873.

(Before Sir T. CHAMBERS, Deputy Recorder.)

REG. v. GOLDSMITH.

Restitution.

The Court is bound by the statute to order restitution of property obtained by false pretences and the subject of the prosecution, in whose hands soever it is found.

And so likewise of property received by a person knowing it to have been stolen or obtained by false pretences.

But the order is strictly limited to property indentified at the trial as being the subject of the charge.

Therefore, it does not extend to property in the possession of innocent third persons which was not produced and identified at the trial as being the subject of the indictment.

THE prisoner had been convicted of obtaining by false pretences divers articles of jewellery.

Metcalfe, Q.C., for the prosecution applied for an order for the restitution of the property under the counts for false pretences.

THE DEPUTY-RECORDER.—Personally, I should have preferred that there should be some discussion on this application. Moreover, I have carefully looked at the cases and I have had the opportunity to consult Baron Bramwell about it, and he quite

agrees with me that I have no discretion whatever in the case, and that I could not possibly refuse to exercise the authority which the statute confers on me, and which by conferring imposes the obligation of exercising it if proper application is made. Under these circumstances I am obliged to make the order.

Metcalf, Q.C.—I have to make a further application under the two last counts of the indictment for a further restitution of the property. Those two counts specify not only the articles mentioned in the false pretence counts, but other property in possession at this moment of the officers of the court. Those counts are for receiving goods which had been obtained by false pretences under the statute, and the same section which gives you power to make restitution under the false pretence counts (sect. 100) goes on to say “Any person guilty of such felony or misdemeanour as is mentioned in the Act, &c.,” or “of knowingly receiving any chattel, money, or valuable security, or any other property whatsoever, or taken or obtained as before-mentioned.”

The DEPUTY-RECORDER.—I think the same obligation is upon the court to make this order.

Giffard, Q.C.—I am instructed on behalf of some of the parties.

The DEPUTY-RECORDER.—I intended the order to apply to the whole of the property.

Giffard.—I take it that the order can be applicable to such goods only as have been found by the verdict of the jury to have been unlawfully obtained.

Metcalf.—Every article is specifically mentioned in those counts.

Giffard.—As having been unlawfully obtained.

Metcalf.—No ; unlawfully received.

The DEPUTY-RECORDER.—You mean on the counts for receiving.

Giffard.—This is not a question of the Act of Parliament.

The DEPUTY-RECORDER.—Of course the goods must be identified as having been obtained by false pretences and having been knowingly received.

Giffard.—I am not contending that, assuming there has been proof before you that an article has been obtained by false pretences it is protected from the operation of the order by reason of its afterwards having been unlawfully received ; but I contend that as a condition precedent to the execution of that order it must have been proved before you that the particular articles were obtained by false pretences.

Metcalf.—The two counts specify every article that has been produced in evidence.

The DEPUTY-RECORDER.—The order of restitution can be made applicable only to such articles as shall be shown to have been obtained by such false pretences, and also, perhaps, such as have been unlawfully received with a guilty knowledge.

Giffard.—Yes.

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THE DEPUTY RECORDER.—It should take effect on no other property but such as has been identified.

Giffard.—It is an important question of the application of the statute in this case. If in this court anybody has been convicted of obtaining those goods by false pretences, and has also been convicted of receiving those goods knowing them to have been so obtained, I do not question the jurisdiction, but I contend that this is a condition precedent, and I have not before me either the allegations or the articles.

Metcalfe.—The Clerk of the Arraignment will judge as to the articles.

MR. AVORY (Clerk of the Arraignment).—I was going to ask the Court, as I shall have to obey the order and a large quantity of property is in question, if I am to conclude that every article mentioned in the indictment is to be given up.

Metcalfe.—Your Lordship will remember that, at the trial, when several of these jewellers and pawnbrokers were up, they said, “We have other articles, but those do not apply to the case,” and we rejected them.

THE DEPUTY RECORDER.—All specified on the trial are in possession of the Court, and those have been identified. The articles to which the evidence did not apply are not produced and are not in the officer’s custody.

Williams, for Messrs. Beer.—There was one article which the prisoners said was not their property, a centre diamond.

Metcalfe.—That has not been handed in.

THE DEPUTY RECORDER.—If it has, it comes within the statute. What I said was, the diamond must be identified.

Metcalfe.—If it is not identified, Mr. Avory will see to that.

MR. AVORY.—I shall not deliver up any article about which there is the least controversy.

Giffard.—I think I understand what your Lordship means. The power applies to “any person guilty of any such felony or misdemeanour.” Now if the articles are identified as having been obtained by any person not guilty of such felony or misdemeanour, I do contest the power.

THE DEPUTY-RECORDER.—That is all the power; it extends to anything that is identified as the subject of this charge.

MIDDLESEX SESSIONS.

September, 1873.

(Before Mr. SERJEANT COX, Deputy-Assistant Judge.)

REG. v. SMITH.

Restitution.

An order of restitution of property stolen will extend only to such property as is produced and identified in the course of the trial, and not to all the articles named in the indictment, unless so produced and identified and in the possession of the Court.

PRISONER had been convicted of stealing a large quantity of looking glasses, which had afterwards been sold by auction at a public sale room in London, and purchased by many persons.

Three only of these looking glasses were produced and identified at the trial, and they were ordered to be restored to the owner.

Besley applied for an order to compel the other purchasers to give up the glasses they had bought in like manner. He cited the case of *Reg. v. Goldsmith* (*suprà*) not then reported, and contended that inasmuch as the indictment had charged the prisoner with stealing all the looking glasses, they were all the subject of this charge, and an order of restitution would extend to all.

Mr. SERJEANT COX, after reading the shorthand writer's notes of *Reg. v. Goldsmith* (as reported above) said: "I do not so read either the statute or the case before me. I am satisfied that the power of the Court does not extend to all the articles named in the indictment, but to such only as are produced and identified in the course of the trial. How otherwise could it be ascertained if the property in question is in fact that of the claimant? Suppose the possessor of it to deny the fact, how or when is it to be determined? I could not at the next sessions summon the parties before me to hear or try the question of ownership. I must leave the prosecutor to his civil remedy."

Application refused.

COURT OF CRIMINAL APPEAL.

Saturday, April 25, 1874.(Before Lord COLERIDGE, C.J., BLACKBURN, J., PIGOTT, B.,
LUSH, J., and CLEASBY, B.)

REG. v. GEORGE KENDALL. (a)

Larceny.

W. let a horse on hire for a week to C., who fetched the horse every morning from W.'s stable, and returned it after the day's work was done. The prisoner went to C. one day, just as the day's work was done, and fraudulently obtained it from him by saying falsely, "I have come for W.'s horse; he has got a job on, and wants it as quickly as possible." The same evening the prisoner was found three miles off with the horse by a constable, to whom he stated that it was his father's horse, and that he was sent to sell it: Held, that the prisoner was rightly convicted of larceny on an indictment alleging the property of the horse to be in W.

CASE stated for the opinion of this Court by the Chairman of the Second Court at the Middlesex Sessions.

George Kendall was tried before me at the Middlesex Sessions, on the 11th day of February, 1874, on an indictment which charged him with having stolen, on the 28th day of January, 1874, a horse, the property of James Watson.

The facts proved were these:

James Watson, the owner of the horse, had let it on hire for a week to John Coote, a master carman employed in the West India Docks. Coote fetched the horse every morning from Warren's stable, and returned it every afternoon after the day's work was done.

On the 28th day of January, just as the horse's work was done, the prisoner, George Kendall, came to Coote and said, "I have come for Mr. Watson's horse; he has got a job on, and wants it back as quickly as possible." Believing that statement, Coote took the harness off, assisted the prisoner to mount, and desired him to take the horse back to Watson's as soon he could. The prisoner rode off with the horse, did not take it to Watson's, but was found with it the same evening three miles off by a police constable, to whom he stated that it was his father's horse, and that he was sent to sell it.

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Upon proof of these facts, I doubted if the offence amounted to larceny, inasmuch as the horse was not taken out of the possession of Watson, in whom the ownership was laid.

The counsel for the prosecution then applied to amend the indictment, by alleging the property to be in Coote.

I was of opinion, that if this amendment were made, the offence was still not that of larceny, but that of obtaining the horse by false pretences.

There being no question as to the fraudulent intention of the prisoner, I left the case to the jury on the indictment unamended, and they found prisoner guilty.

I desire the opinion of the Court for the Consideration of Crown Cases Reserved, whether the prisoner on these facts could be properly convicted of larceny on the indictment, either as it originally stood, or as amended by alleging the ownership in Coote. If the latter, the amendment is to be considered as made.

I postponed judgment, and the prisoner remains in the House of Correction until the opinion of the Court is pronounced.

(Signed) FRANCIS BARROW,
Chairman of the Second Court Middlesex Sessions.

No counsel appeared for the prisoner.

Abram, for the prosecution.—There is no doubt that if the case is one of larceny the indictment is good, as Watson was owner of the horse, but the learned Judge doubted whether it was not more properly a case of obtaining the horse by false pretences.

BLACKBURN, J.—No doubt it would have been so if the prisoner had been charged with stealing the horse from Coote, the bailee; but as against the owner, Watson, it was larceny.

By the COURT.

Conviction affirmed

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COURT OF CRIMINAL APPEAL.

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(Before Lord COLERIDGE, C.J., BLACKBURN, J., PIGOTT, B., LUSH, J., and CLEASBY, B.)

REG. v. THOMAS COOPER. (a)

Misdemeanour — Fraudulent misappropriation of money by an attorney—24 & 25 Vict. c. 96, ss. 75, 76.

W. deposited title-deeds with D. as security for a loan; and requiring a further loan, the defendant, an attorney, obtained for W. a sum of money from T., and delivered to her a mortgage deed as security. There were no directions in writing to the defendant to apply the money to any purpose, and he was entrusted with the mortgage deed, with authority to hand it over to T., on receipt of the mortgage money, which was to be paid to D. and W., less costs of preparing the deed. The defendant fraudulently converted a substantial part of the money to his own use.

Held, that as there was no direction in writing, and the mortgage-deed was duly delivered to T., the defendant was not guilty of a misdemeanour within 24 & 25 Vict. c. 76. s. 75.

Held, also, that he was not guilty of the misdemeanour, in sect. 76, of converting property entrusted to him for safe custody, with intent to defraud.

CASE reserved for the opinion of this Court by Grove, J., at the last assizes for the county of Chester.

The defendant, an attorney, was indicted under the 24 & 25 Vict. c. 96, for having converted to his own use certain money entrusted to him or received by him as the proceeds of a deed entrusted to him for a special purpose.

The indictment contained two counts framed respectively under the 75th and 76th sections as follows :

First count.—The jurors for our Sovereign Lady the Queen, upon their oath present, that Thomas Cooper, on the 25th day of March, in the year of our Lord 1867, then being an attorney and being entrusted with certain property, to wit, the sum of one hundred and forty pounds, of John Whittaker, for safe custody, did then and there unlawfully and with intent to defraud, convert,

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

and appropriate a certain part of the said property of the said John Whittaker, to wit the sum of eighty pounds, to and for the use and benefit of himself the said Thomas Cooper, against the form of the statute, &c.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Cooper, on the day and year aforesaid, was entrusted by the said John Whittaker with a certain valuable security, to wit, a deed of mortgage of certain property of the said John Whittaker, to secure the repayment of a sum of one hundred and forty pounds then lately before agreed to be lent and advanced to the said John Whittaker by one Martha Taylor, such valuable security being intrusted to the said Thomas Cooper, as the attorney and agent of the said John Whittaker for the special purpose and with the intent and object that the said Thomas Cooper should receive from the said Martha Taylor, the said sum of one hundred and forty pounds, for and on behalf of the said John Whittaker, and having so received such sum, should thereout pay the sum of fifty pounds then due and owing from the said John Whittaker, to one Nathaniel John Dewsbury, and should pay the remainder of such sum of one hundred and forty pounds, to and for the use of the said John Whittaker. And the jurors aforesaid upon their oath aforesaid do further present that the said Thomas Cooper having on the day and year aforesaid, received from the said Martha Taylor, the said sum of one hundred and forty pounds, on the deed and valuable security above mentioned unlawfully, fraudulently, in violation of good faith, and contrary to the purpose, intent, and object with which such valuable security had been so entrusted to him as aforesaid, did convert to his own use and benefit a certain part of the proceeds thereof, to wit the sum of eighty pounds, against the form of the statute, &c.

The facts so far as they are material to the questions submitted to the Court were these :

A Mr. John Whittaker had before 1867 obtained a loan of 50*l.* from a Mr. Dewsbury on a deposit of title-deeds to some leasehold property. In consequence of Whittaker's wish for a further loan, the defendant in 1867 obtained 140*l.* from a Miss Taylor, and prepared and handed to her brother-in-law, who acted for her, a mortgage-deed, securing the 140*l.* Out of the money which defendant was to receive he was to pay off Dewsbury and pay the balance to Whittaker. He did not pay Dewsbury, and he only paid Whittaker 60*l.*, on which Whittaker paid him interest, while he, defendant, without Whittaker's knowledge, paid the mortgagees interest on the 140*l.*, Whittaker being also ignorant, at all events for some years, that defendant had obtained so much as 140*l.* Allowing 10*l.* for the preparation of the mortgage-deed, which defendant's brother and former partner said was a fair sum, the defendant would have 70*l.* of Whittaker's in his possession, less the difference of interest which he paid without authority.

Defendant's counsel contended that there was another 30*l.* paid

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to Whittaker, which would reduce the sum to 40*l.*, but the evidence preponderated greatly against this.

A good many letters were put in to show the defendant's conduct in the matter, but with these the Court need not be troubled.

After reading to them the material parts of the evidence, I told the jury that if they were satisfied without reasonable doubt, that the defendant received the 140*l.* from Whittaker, and, in violation of good faith, and fraudulently, converted to his own use a substantial part of the money which they considered he should have paid to Whittaker, and to Dewsbury for him, they should find him guilty; otherwise not.

The jury found a verdict of guilty.

It must be taken by the Court: 1st, that there were no directions in writing to the defendant to apply the money or any part of the proceeds of the deed to any purpose; 2nd, that defendant was entrusted with the mortgage deed with authority to hand it over to the mortgagee or her agent on receipt of the mortgage-money which was to be paid to Dewsbury and Whittaker, less costs of preparing deed; 3rd, that defendant received 140*l.* for Whittaker's use, and in violation of good faith and contrary to the purpose for which such deed and money were entrusted to him, converted a substantial part of the money to his own use.

I respited the judgment, and allowed the defendant to go out on bail (to be fixed by magistrates) to appear for judgment if required.

The question for the Court is—Does the offence committed by the defendant come within either or both the sections above named, viz., the 75th and 76th sections.

If within both or either of them, the conviction to be affirmed, if not within either, a verdict of not guilty to be entered.

Bowen, Q.C. (*E. J. Dunn* with him) for the prisoner.—The conviction cannot be sustained. The case is not within the language of either section of the statute. [He was then stopped by the court.]

Torr, Q.C., in support of the conviction.—The first count of the indictment is framed upon the 76th section of the 24 & 25 Vict. c. 76, which enacts that "whosoever, being a banker, merchant, broker, attorney, or agent, and being entrusted with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, &c., shall be guilty of a misdemeanor." Here the defendant got the money from Miss Taylor to hold safely until he had fulfilled her injunctions to pay off Dewsbury, and pay the balance to Whittaker. [BLACKBURN, J. — The defendant did not fraudulently dispose of the mortgage security. Lord COLERIDGE, C.J.—And it cannot be said that the money was entrusted to him for safe custody.] The second count is framed upon the 75th section, which enacts that "whosoever having

been entrusted as a banker, merchant, broker, attorney, or other agent with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof, or the proceeds or any part of the proceeds of such security for any purpose or to any person specified in such direction, shall in violation of good faith, and contrary to the terms of such direction, convert to his own use or benefit, or the use, &c., such money, security, or proceeds, or any part thereof respectively; and whosoever, having been entrusted as banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, &c., for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him to sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, &c., such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor." The defendant is brought within that provision by the facts, for he was intrusted with the mortgage deed to hand it over to Miss Taylor on receipt of the mortgage money which was to be paid to Dewsbury and Whittaker. [Lord COLERIDGE, C. J.—He was not intrusted with the proceeds of an improperly pledged mortgage deed.] The case falls within the second part of the enactment in sect. 75. [PIGOTT, B.—No. The foundation of the offence is that the defendant must have without authority improperly transferred or pledged a chattel or security intrusted to him for safe custody or some special purpose. If he had been indicted under sect. 3 for converting to his own use property bailed to him, I am inclined to think he might have been convicted. BLACKBURN, J.—This money was not the proceeds of a chattel converted contrary to good faith.]

Lord COLERIDGE, C. J.—I am of opinion that the conviction should be quashed. The indictment is framed under two sections of the 24 & 25 Vict. c. 96, and consists of two counts, the first framed upon the 76th section, and the second upon the 75th section. The first count upon the 76th section is out of the question, because the defendant has not improperly dealt with any property entrusted to him for safe custody within the meaning of that section. Then the second count is framed upon the 75th section, which seems to consist of two parts: the first part relates to the case of a banker, merchant, broker, attorney, or other agent entrusted with any money or security for the payment of money with any direction in writing to apply, pay, or deliver such money or security, or any part thereof, for any purpose or to any person specified in such direction who shall in violation of good faith and contrary to the terms of such

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direction, convert the same to his own use or benefit. Now this case is not within that part of the section, for here there is no direction in writing to apply, pay, or deliver the money and security. Then is the case within the second part of the section? That is, "Whosoever having been entrusted as banker, merchant, broker, attorney, or other agent with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted, sell, negotiate, &c., or in any manner convert to his own use or benefit, such chattel or security or the proceeds of the same," &c. Now these are the facts: the defendant, as attorney for Whittaker, had obtained from Miss Taylor a sum of money advanced by her on mortgage with which to pay off Dewsbury's prior advance, and to pay over the balance to Whittaker. The mortgage deed was Miss Taylor's, and the moneys in a certain sense the moneys of Dewsbury and Whittaker. The mortgage deed was properly drawn and delivered to Miss Taylor, but the defendant misappropriated part of the moneys advanced by Miss Taylor on the mortgage. But those moneys were not the proceeds of a mortgage deed improperly transferred within the meaning of this enactment, which means shall convert either a security or money entrusted to him for safe custody or for any special purpose. The defendant therefore is not brought within the words of the enactment, and the conviction must be quashed.

The rest of the court concurring.

Conviction quashed.

Attorney for the prosecutor, *Nordon*, Liverpool.

Attorney for the defendant, *Sherratt*, Kidsgrove.

COURT OF CRIMINAL APPEAL.

Saturday, May 2, 1874.

(Before Lord COLERIDGE, C.J., BLACKBURN, J., PIGOTT, B.,
LUSH, J., and CLEASBY, B.)

REG. v. FARRELL. (a)

*Evidence—Inability of witness to travel—Reception of deposition—
11 & 12 Vict. c. 42, s. 17.*

The deposition of a witness properly taken before the committing magistrate, with full opportunity of cross-examination by the accused, was allowed to be read at the trial under the following circumstances, in the absence of the witness, who was alive, and who was living not far from the Court where the prisoner was being tried. It was proved by a medical man that the witness was seventy-four years old, and that he thought that she would faint at the idea of coming into Court, and that seeing so many faces would be dangerous to her, and that she was so nervous that it might be dangerous to her to be examined at all, but that he thought she could go to London to see a doctor without difficulty or danger.

Held that her deposition ought not to have been received under the 11 & 12 Vict. c. 42, s. 17.

CASE reserved for the opinion of this Court by Lord Coleridge, C.J.

The prisoner was indicted for embezzlement, and was tried before me at Stafford, on Saturday, 14th March, 1874.

In the course of the case for the prosecution it was proposed to put in evidence the deposition of Mary Lee, the aunt of the prosecutor, who sold milk, and whose milk accounts were entirely kept and his milk business managed by Mary Lee, his aunt.

To Mary Lee the prisoner had been in the habit of accounting. Mary Lee was alive and was living in Stafford, not far from the Court where the prisoner was being tried.

Due proof having been given that her deposition was properly taken in the presence of the prisoner, and with full opportunity of cross-examination, it was proposed to read it under 11 & 12 Vict. c. 42, s. 17, on the ground that she was so ill as to be unable to travel.

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On this point Samuel Cookson, a doctor of medicine living in Stafford, and the regular medical attendant of Mary Lee, gave the following evidence:—

“I am a doctor of medicine living and practising in Stafford. I know Mary Lee. She is very nervous and seventy-four years of age. I think she would faint at the idea of coming into Court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous for her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the Court.”

I received the deposition and evidence, and the jury convicted the prisoner. But I respited the sentence, and now request the opinion of the Court of Criminal Appeal whether the deposition ought to have been received. If it ought not, the conviction must be quashed.

April 25.—This case was called on for argument, but no counsel appeared on either side.

May 2.—Lord COLERIDGE, C.J., now delivered the judgment of the Court.—We are of opinion that upon the facts in this case the deposition of Mary Lee was improperly received in evidence under the 11 & 12 Vict. c. 42, s. 17, which (after directing justices to take in manner therein-mentioned the statement on oath or affirmation of the witnesses appearing against any person charged before them with an indictable offence) enacts that if afterwards “upon the trial of the person so accused it shall be proved that any person whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.” We think that old age, and nervousness, and inability to stand a cross-examination is not a sufficient foundation for the reading of the deposition, and that it would raise a dangerous latitude in practice if we were to admit it upon such grounds.

Conviction quashed.

COURT OF CRIMINAL APPEAL.

Saturday, April 25, 1874.

(Before Lord COLERIDGE, C.J., BLACKBURN, J., PIGOTT, B.,
LUSH, J., and CLEASBY, B.)

REG. v. PEMBLITON. (a)

Malicious injury to property—Throwing a stone at a person but missing the person and breaking a window—24 & 25 Vict. c. 97, s. 51.

Defendant was indicted for unlawfully and maliciously committing damage upon a window in the house of the prosecutor contrary to the 23 & 24 Vict. c. 97, s. 51. Defendant who had been fighting with other persons in the street after being turned out of a public house, went across the street, and picked up a stone, and threw at them. The stone missed them, passed over their heads, and broke a window in a public house. The jury found that he intended to hit one or more of the persons he had been fighting with, and did not intend to break the window :

Held that upon this finding the prisoner was not guilty of the charge within the above statute.

To support a conviction under sect. 51 there must be a wilful and intentional doing of an unlawful act in relation to the property damaged.

CASE stated for the opinion of this Court by the Recorder of Wolverhampton.

At the Quarter Sessions of the Peace held at Wolverhampton on the 8th day of January instant Henry Pembliton was indicted for that he "unlawfully and maliciously did commit damage, injury, and spoil upon a window in the house of Henry Kirkham" contrary to the provision of the stat. 24 & 25 Vict. c. 97, s. 51. This section of the statute enacts :

"Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever either of a public or a private nature for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding 5*l.*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years with or with-

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out hard labour; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, he shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding five years and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labour."

On the night of the 6th day of December, 1873, the prisoner was drinking with others at a public-house called "The Grand Turk" kept by the prosecutor. About eleven o'clock p.m. the whole party were turned out of the house for being disorderly, and they then began to fight in the street and near the prosecutor's window, where a crowd of from 40 to 50 persons collected. The prisoner, after fighting some time with persons in the crowd, separated himself from them, and removed to the other side of the street, where he picked up a large stone, and threw it at the persons he had been fighting with. The stone passed over the heads of those persons, and struck a large plate glass window in the prosecutor's house, and broke it, thereby doing damage to the extent of 7l. 12s. 9d.

The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window; and they returned a verdict of "guilty" whereupon I respited the sentence, and admitted the prisoner to bail, and pray the judgment of the Court for Crown Cases Reserved, whether upon the facts stated and the finding of the jury, the prisoner was rightly convicted or not.

(Signed) JOHN J. POWELL.
Recorder of Wolverhampton.

No counsel appeared to argue for the prisoner.

J. Underhill for the prosecution.—The conviction was right under the statute, for it is found that the prisoner threw the stone at the people, intending to hit some or one of them; that is, that he was guilty of a malicious act; and the other part of the finding, that he did not intend to break the window, may be rejected as surplusage. An unlawful act done without just cause implies malice. In the Act there are some sections under which it is necessary that there should be the malicious intention, in order to prove the offence, but there are others under which it is not necessary that there should be the intention. For instance sect. 58 enacts that every punishment and forfeiture imposed by the Act on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise. There was malice against the persons at whom the stone was thrown and the consequence of throwing

the stone was the damage to the window. The above section seems to dispense with proof of malice against the owner of the property injured, and the rule of law that a man must be taken to intend the consequence of an unlawful act also applies. In 1 Russell on Crimes, 667 (3rd edit.), it is said "It should, however, be observed that when the law makes use of the term 'malice aforethought' as descriptive of the crime of murder it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit—a heart regardless of social duty and deliberately bent on mischief. And in general any formed design of doing mischief may be called malice: (Fost. 256, 262.)" [BLACKBURN, J.—Foster is speaking of murder in that passage.] Lord Coke (3 Inst. 56) also speaking of murder says "If the Act which causes death is unlawful it is murder." He puts the case of a man who, intending to steal a deer in a park, shoots at it, and by the glance of the arrow kills a boy that is hidden in a bush. "This, he says, is murder, for the act was unlawful, although A. had no intent to hurt the boy, nor knew not of him." [BLACKBURN, J.—Is there any authority except those *dicta* and *Plummer's case* (Kely. 109) which go that length?] The same rule is laid down in East's P. C. 231, and Lord Hale, P. C. 451. [LUSH, J.—Lord Coke seems to put it on the unlawfulness of the act, and he goes so far as to say "If a man, knowing that many people come in the street from a sermon, throw a stone over the wall, intending only to frase them or to give them a slight hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death and though he knew not the party slain." Surely that would be only manslaughter unless he knew what his act would probably do, or unless he intended to do grievous bodily harm. You have to make out, not only that the act was unlawful, but that it was malicious. Does not that mean intentionally malicious? Must you not show that he did maliciously break the window?] Suppose a man throws at one window and misses it, but breaks another. Would not that case be within the Act, although there was no intention to break the particular window? In Rus. 739 it is said, "There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief; and the party committing them and causing death by such conduct will be guilty of manslaughter." In *Reg. v. Ward* (12 Cox C. C. 123; 41 L. J. 69, M. C.), where the prisoner who was jealous of other persons going in pursuit of wild fowl in a creek of a river, fired from his boat while the prosecutor was in pursuit of wild fowl in the creek in a way so as to frighten and deter him from going there again; but as the prosecutor's punt slewed round, he was struck by the shot from the prisoner's gun; but if the boat had not slewed round, the shot

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would not have struck him; and it was held by a majority of twelve judges to three that there was evidence of a malicious wounding by the prisoner. [LUSH, J.—In that case Kelly, C.B. asked "Does maliciously necessarily mean intentionally?"] The cases of *Rex v. Haughton* (5 C. & P. 555), and *Reg. v. Monaghan* (23 L. T. Rep. N. S. 168) were then cited. If a person throws a stone in a neighbourhood where there are windows intending seriously to hurt some person, can he excuse himself because the result is only that a window is broken instead of a man's head? Sect. 39 relates to unlawful and malicious injuries to works of art. Now if two persons happen to quarrel in a museum and one throws a missile at the other and misses him, but destroys a valuable art specimen, is he to be held not guilty of an offence because his malicious intention was towards the man and not the property or its owner? Yet that must follow, if the conviction is not upheld in this case.

LORD COLERIDGE, C.J.—I am of opinion that this conviction must be quashed. The facts of the case are these. The prisoner and some other persons who had been drinking in a public house were turned out of it at about 11 p.m. for being disorderly, and they then began to fight in the street near the prosecutor's window. The prisoner separated himself from the others, and went to the other side of the street, and picked up a stone, and threw it at the persons he had been fighting with. The stone passed over their heads, and broke a large plate glass window in the prosecutor's house, doing damage to an amount exceeding 5*l.* The jury found that the prisoner threw the stone at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window. The question is whether under an indictment for unlawfully and maliciously committing an injury to the window in the house of the prosecutor the proof of these facts alone, coupled with the finding of the jury, will do? Now I think that is not enough. The indictment is framed under the 24 & 25 Vict. c. 97, s. 51. The Act is an Act relating to malicious injuries to property, and sect. 51 enacts that whosoever shall unlawfully and maliciously commit any damage, &c., to or upon any real or personal property whatsoever of a public or a private nature, for which no punishment is hereinbefore provided, to an amount exceeding 5*l.*, shall be guilty of a misdemeanor. There is also the 58th section which deserves attention. "Every punishment and forfeiture by this Act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise." It seems to me on both these sections that what was intended to be provided against by the Act is the wilfully doing an unlawful Act, and that the Act must be wilfully and intentionally done on the part of the person doing it, to

render him liable to be convicted. Without saying that, upon these facts, if the jury had found that the prisoner had been guilty of throwing the stone recklessly, knowing that there was a window near which it might probably hit, I should have been disposed to interfere with the conviction, yet as they have found that he threw the stone at the people he had been fighting with intending to strike them and not intending to break the window, I think the conviction must be quashed. I do not intend to throw any doubt on the cases which have been cited and which show what is sufficient to constitute malice in the case of murder. They rest upon the principles of the common law, and have no application to a statutory offence created by an Act in which the words are carefully studied.

BLACKBURN, J.—I am of the same opinion, and I quite agree that it is not necessary to consider what constitutes wilful malice aforethought to bring a case within the common law crime of murder, when we are construing this statute, which says that whosoever shall unlawfully and maliciously commit any damage to or upon any real or personal property to an amount exceeding 5*l.*, shall be guilty of a misdemeanor. A person may be said to act maliciously when he wilfully does an unlawful act without lawful excuse. The question here is can the prisoner be said, when he not only threw the stone unlawfully, but broke the window unintentionally, to have unlawfully and maliciously broken the window. I think that there was evidence on which the jury might have found that he unlawfully and maliciously broke the window, if they had found that the prisoner was aware that the natural and probable consequence of his throwing the stone was that it might break the glass window, on the principle that a man must be taken to intend what is the natural and probable consequence of his acts. But the jury have not found that the prisoner threw the stone, knowing that, on the other side of the men he was throwing at, there was a glass window and that he was reckless as to whether he did or did not break the window. On the contrary, they have found that he did not intend to break the window. I think therefore that the conviction must be quashed.

PIGOTT, B.—I am of the same opinion.

LUSH, J.—I also think that on this finding of the jury we have no alternative but to hold that the conviction must be quashed. The word "maliciously" means an act done either actually or constructively with a malicious intention. The jury might have found that he did intend actually to break the window or constructively to do so, as that he knew that the stone might probably break it when he threw it. But they have not so found.

CLEASBY, B. concurred.

Conviction quashed.

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COURT OF CRIMINAL APPEAL.

April 25 and May 8, 1874.(Before Lord COLERIDGE, C.J., BLACKBURN, J., PIGOTT, B.,
LUSH, J., and CLEASBY, B.)

REG. v. C. F. FRANCIS. (a)

False pretence—Evidence—Guilty knowledge.

Prisoner was indicted for an attempt to obtain money from W., a pawnbroker, by false pretences (inter alia) that a ring was a diamond ring; and also for an attempt to obtain money from D. another pawnbroker by a similar false pretence. To show guilty knowledge, evidence that he had shortly before offered other false articles of jewellery to other pawnbrokers was held to be properly admissible.

CASE reserved for the opinion of this Court by Blackburn, J.

The prisoner was indicted at Northampton Assizes jointly with one Joseph Roberts.

The indictment contained counts for a conspiracy to defraud, and also a count for an attempt to obtain money from one George Walters by false pretences (*inter alia*) that a ring was a diamond ring. And a count for attempting to obtain money from Caleb Dyer by a similar false pretence.

On the trial evidence was given that Francis came on the 8th Jan. 1873, to the shop of Walters, who is a pawnbroker in Northampton, and asked for an advance of 15*l.* on the pledge of a hoop ring which he represented to be a diamond ring, a silver watch, and a gold chain. The pawnbroker examined the ring, and declared it was not a diamond ring. He refused to advance anything on it. The prisoner Francis, after asking for an advance of 11*l.*, left the shop. Francis immediately proceeded to the shop of Dyer, who is also a pawnbroker in the same street, and asked for an advance of 13*l.* on the same property. He obtained no advance and was taken into custody on a charge of giving a false name and address under the Pawnbrokers' Act.

The ring was produced in Court and evidence was given that the stones were not diamonds, but crystals and were not worth more than 6*d.* each.

Francis's statement when taken and his defence at the trial was

(a) Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

that he did not know that the ring was false, he being employed, as he said, by Roberts to pawn the ring, and believing his assertion that it was a diamond ring.

Evidence was then offered, in order to prove guilty knowledge in Francis, that he had shortly before offered other false articles to other pawnbrokers. I admitted the evidence, but as the cases relied on for the prosecution were all cases either of forgery, or uttering counterfeit coin, I reserved the question whether, on such a charge as this, such evidence was admissible for the purpose of proving guilty knowledge.

A witness was called who proved that on the 6th of January, 1873, at Bedford, the prisoner Francis obtained 35s. from a pawnbroker of the name of Lazenby on the pledge of a chain represented by him to be a gold chain, and that he then gave a false name and address. The chain was produced in Court and evidence was given that it was silver coated with gold, and not worth 35s.

On the same day the 6th Jan. Francis, at Leicester, offered to a pawnbroker called Stowe, who was called as a witness, in pledge a watch and a cluster ring, consisting as he said of diamonds, and asked for an advance of 15*l.* upon them. The pawnbroker refused to advance anything, telling him the ring was not a diamond ring.

On the same day Francis offered in pawn to Taylor, also called as a witness, the son of a pawnbroker in Leicester, a watch and a cluster ring which he said was a diamond ring, and asked 13*l.* on them. Taylor thought the ring not a diamond ring, but did not say so to the prisoner. He told him he could not advance so much in the absence of his father, and desired the prisoner to come again next day. He did not do so.

The cluster ring mentioned by these two witnesses was not produced in Court, and the only evidence that it was false was the opinion of Stowe and Taylor that it was so.

There was no sufficient evidence against Roberts, and I directed his acquittal and a verdict of not guilty on the counts for a conspiracy.

I left to the jury the case against Francis on the counts for an attempt to obtain money by false pretences, telling them that it was of the essence of the charge not only that Francis attempted to obtain the advance on the ring as a diamond ring when it was not, but also that he then had guilty knowledge that it was not. And I left to them as evidence of that guilty knowledge the previous transactions. The jury found him guilty. I have no doubt that the evidence admitted had much weight with them, and therefore if the evidence was improperly received the conviction should be quashed.

I sentenced the prisoner to nine months' imprisonment, but respited the execution of the sentence till the point of law was determined, directing that he should be admitted to bail if he could find two securities in 50*l.* each.

The question for the opinion of the Court is,

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Whether the evidence above mentioned was properly received for the purpose of proving guilty knowledge.

(Signed)

COLIN BLACKBURN.

Hensman for the prisoner.—The evidence in question ought not to have been received, for it was calculated merely to introduce prejudice against the prisoner, and to embarrass him in his defence by importing a number of other charges into the case without notice, and which the prisoner had not a fair opportunity of defending himself against. By the Prevention of Crime Act, 1871 (34 & 35 Vict. c. 112), s. 19, evidence of other stolen property having been found in the possession of a person proceeded against for having received goods knowing them to be stolen may be given, but that is limited to the period of twelve months previously. But here the principle upon which it is proposed to admit the evidence in question has no limit in point of time. [BLACKBURN, J.—Yes, it must be reasonably near the time to the case before the Court, to afford a presumption of the prisoner's innocence.] Evidence of this kind has heretofore been usually confined to cases of passing counterfeit coin and forged bank notes. In 1 *Rus. on Crimes*, 127 (3rd edit.), it is said "For the purpose of proving the act charged in the indictment to have been done knowingly, it is the practice to receive proof of more than one uttering, committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice on trials for disposing of and putting away forged bank notes, knowing them to be forged." In *Reg. v. Oddy* (5 Cox C. C. 110), where, before the 34 & 35 Vict. c. 112, it was held that, on an indictment for receiving stolen goods, evidence that the prisoner had, at a time previous to the receipt of the prosecutor's goods, had in his possession other similar goods stolen from another person was held inadmissible. Lord Campbell, C.J. said "that the evidence went to show that the prisoner was a very bad man and a likely person to commit such offences as those charged, but that the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the same person; that the evidence which was received at the trial did not tend to show that the particular goods in the indictment were stolen at the time that he received them; that the rule which had prevailed in the case of indictments for uttering forged bank notes of allowing evidence to be given of the uttering of other forged notes to different persons had gone to great lengths, and that he should be unwilling to see the rule applied generally in the administration of the criminal law." So in *Reg. v. Holt* (8 Cox C. C. 411) it was held that, upon an indictment for obtaining a sum of money from a customer of the prosecutors by a false pretence, evidence that the prisoner had obtained, within a week previously, another sum of money from another customer by a like false pretence, was inadmissible. [Lord

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Coleridge, C. J., referred to *Reg. v. Gray* (4 F. & F. 1102), where the prisoner was indicted for arson with intent to defraud an insurance company, and in order to prove that the fire was the result of design and not of accident, evidence was admitted that the prisoner had previously occupied two houses in succession both of which had been insured, that fires had broken out in both, and that the prisoner had been paid by the insurance companies in respect of such fires. Again in *Reg. v. Geering* (18 L. J. 215, M. C.) where upon an indictment of a woman for poisoning her husband by arsenic, in order to show that his death was not accidental, evidence was admitted that arsenic had been taken by three of the sons a few months after their father's death, and that the husband and the three sons who died all exhibited the same symptoms and that the woman had been in the habit of preparing their meals.] In those cases the evidence seems to have been admitted on the ground that it was evidence of one continuing transaction. In *Reg. v. Oddy*, Alderson, B. said "One reason why such evidence had been held to be admissible in charges of uttering might be that one act of uttering a forged note or bill might be said to be similar to another act of uttering a forged note or bill. And so it is clear that the act received in evidence is of the same nature as that which it is admitted to explain." A man has no right to be in possession of forged notes. but he has a right to be in possession of false diamonds. Again the evidence received was of offences against different persons. The cases of *Rex v. Millard* (Rus. & Ry. 245), *Reg. v. Forbes* (7 C. & P. 224) and *Reg. v. Cooke* (8 C. & P. 582) were then referred to. However it may be with respect to the admission of evidence of the acts themselves, what was said and done by the prisoner and the pawnbrokers at the time was not receivable. Evidence only of the fact of pawning and attempting to pawn false jewellery was admissible: (*Rex v. Phillips*, 1 Lew 106; *Reg. v. Fudge*, 9 Cox C. C. 430.)

No counsel was instructed to argue for the prosecution.

Cur. adv. vult.

✓ *May 8.*—The judgment of the Court was this day delivered by Lord COLERIDGE, C.J.—In this case the question reserved for the Court is, whether the evidence mentioned in the case was properly received for the purpose of proving guilty knowledge. No question is reserved as to the weight of that, evidence, the Judge who tried the case not entertaining any doubt that, if the evidence was properly received, the verdict was justified. It seems clear upon principle that, when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act, or acted under a mistake, evidence of the class received must be admissible. It tends to show that he had been pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive;

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for a man may be many times under a similar mistake or may be many times the dupe of another. But it is less likely he should be so oftener than once, and every circumstance which shows that he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last. This is amply borne out by authority. In the case of *Rex v. Tattersall*, mentioned by Lord Ellenborough in *Rex v. Wylie* (1 N. R. 93), the question reserved by Chambre, J., was "Whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion might not infer his knowledge on another." The opinion of the Judges was that the jury were at liberty to make such an inference. The cases in which this had been acted on are most commonly cases of uttering forged documents or base coin, but they are not confined to those cases. Now, in the present case the prisoner was tried on two charges of attempting on the 8th of January, at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewellery consisted of real stones, and evidence that he, on the 6th of January, at Bedford, obtained money from another pawnbroker on the pledge of a chain which he represented to be gold when it in fact was not gold, was surely matter from which the jury might infer that he was pursuing a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine; and that inference was greatly strengthened by the fact that he at that time gave a false name. And though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had a guilty knowledge is as legitimate as if it had been a second false chain. It was objected that the evidence of what took place at Leicester was not properly received, because the cluster ring which he there attempted to pass was not produced in Court, and that the evidence of two witnesses who saw it, and swore to its being false, was not admissible. No doubt, if there was not admissible evidence that this ring was false, it ought not to have been left to the jury. But though the non-production of the article may afford ground for observations more or less weighty, according to the circumstances, it only goes to the weight, not to the admissibility of the evidence, and no question as to the weight of this evidence is now before us. Where the question is as to the effect of a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that when the issue is as to the state of a chattel, *e.g.*, the soundness of a horse or the quality of the bulk of goods sold by sample, the production of the chattel is primary evidence and no other evidence can be given till the chattel is produced in Court for the inspection of the jury. The law of evidence is the same in criminal and in civil suits. The conviction therefore should be confirmed.

Conviction affirmed.

SUPREME COURT OF ILLINOIS, U.S.

October 3, 1873.

RAFFERTY V. THE PEOPLE.

Murder—Police Officer acting on a Void Warrant—Manslaughter.

If the process under which a Police Officer arrests is so defective as to be an absolute nullity, or if the Officer exceed his authority, the killing of him by the party arrested, if there be no malice, is manslaughter only, and not murder.

A POLICEMAN, named Scanlan, had arrested the prisoner upon a warrant which was one of a number signed by the magistrate in blank. The name of the prisoner was written therein by Police Sergeant Hood in the absence of the magistrate, as was also the date, which was made Aug. 5 instead of being Aug. 4, which was Sunday. Scanlan had no other authority to arrest the prisoner than this warrant. There was resistance by the prisoner to the arrest, and in the conflict the policeman Scanlan was killed.

The prisoner Rafferty was indicted for murder. The facts as to the imperfect warrant were proved, and it was contended on his behalf that although where officers have authority to arrest and are assaulted and killed in the proper exercise of such authority, it is murder—if the arrest is illegal the offence is reduced to manslaughter. The Court had refused to allow the warrant to be put in evidence in order to show its illegality, and it was contended for the prisoner that the Court had no right to exclude the warrant inasmuch as it was competent to the accused to show that the homicide was manslaughter only and not murder. The jury found the prisoner guilty of murder, and he brought his writ of error, upon which, after argument, the Court now gave judgment.

The opinion of the Court was delivered by McALLISTER, J.

The plaintiff in error having been found guilty upon an indictment for the murder of Patrick O'Meara, and sentenced to suffer the penalty of death, has caused the evidence, together with the rulings of the Court and exceptions taken, to be preserved in a bill of exceptions, and brought the record to this court for review upon writ of error. Various errors have been assigned, among which is the exclusion of proper evidence, and overruling his motion for a new trial. We propose to consider but one question

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presented, and that is one vitally affecting the merits of the case, and which we cannot disregard without overriding a plain and well-settled rule of law based upon a foundation no less solid than the natural rights of personal liberty and security—rights held sacred by the common law, and recognized and protected by constitutional enactments. The record contains evidence tending to show that the homicide was committed by the prisoner in resisting the deceased, who was a policeman of the city of Chicago, whilst engaged, in connection with another policeman, whom he was aiding in the act of committing an illegal and wholly unjustifiable invasion of plaintiff's liberty, by attempting to seize his person and take him off to prison, without any authority in law so to do. The circumstances which the evidence tends to prove were briefly these: At a little after midnight of the night of the 4th, and early in the morning of the 5th of Aug., 1872, the prisoner was sitting, quietly and peaceably, by a table in a saloon, when O'Meara, the deceased, and another policeman of the name of Scanlan came in. O'Meara immediately pointed the prisoner out to Scanlan. The prisoner, upon seeing O'Meara, addressed him in a friendly manner, asking him to take something to drink, or a cigar, which was declined. Scanlan then went directly up to the prisoner, tapped him on the shoulder, and told him he had a warrant for him. The prisoner demanded the reading of the warrant, which was done, and prisoner apparently submitted to the arrest, but immediately threatened to shoot the first man who should lay a hand upon him. O'Meara, who came with a slung shot hung to his wrist, stationed himself at the outer door to prevent prisoner's escape, while Scanlan kept himself in position to guard a back door. All this occurred in a brief space of time, and while O'Meara, with the slung-shot suspended from his wrist, was thus guarding the door which led into the street, the prisoner shot him with a pistol, inflicting a mortal wound. There is not the slightest pretence in the case that the prisoner had been accused or suspected of having committed any felony, or that he, at the time, was in the act of committing a misdemeanor, or even any violation of a city ordinance. The facts appearing from the evidence are, that the homicide was committed while deceased was assisting in the arrest of the prisoner, under the circumstances stated. No attempt was made by the State's attorney, on the trial, to show that the prisoner had been charged with the commission of any felony, or to prove that either of the policemen in question had in his possession, at the time, any lawful writ or warrant authorising the prisoner's arrest. But the counsel for the prisoner caused to be produced and identified the supposed warrant which the policemen had, and upon which the arrest was made, and established by indisputable evidence that Police Sergeant Hood had, in his drawer, a number of blank summonses and warrants, which had been signed by Police Magistrate Banyon, and which the Sergeant had been accustomed to fill up, in the absence of the magistrate, and use

from time to time, as exigencies might require; that, from these blanks, he, on Sunday, Aug. 4, 1872, filled up the one in question, putting the prisoner's name into it, in the absence of the magistrate; and to avoid the appearance of having been issued on Sunday, it was dated the 5th of August. This paper was delivered to Scanlan, and he and O'Meara proceeded, as the evidence clearly shows, to hunt for the prisoner all that Sunday night, with the intention of arresting him on that pretended process as soon as midnight was passed, if they could find him. When the supposed warrant was introduced in evidence, and the testimony showing how it was brought into existence was given, the Court, upon the motion of the State's attorney, excluded the warrant, and all evidence relating to it, from the jury, as incompetent, to which the prisoner's counsel excepted. The supposed warrant, as filled out by the sergeant, was directed to any constable or policeman of the city of Chicago, commanding them to take the body of Christopher Rafferty, and bring him, forthwith, before the magistrate, unless special bail should be entered, and if such bail should be entered, then to command Rafferty to appear before such magistrate at 8 o'clock a.m. on the 10th day of August 1872, at his office, &c., "to answer the complaint of the city of Chicago in a plea of debt, for a failure to pay said city a certain demand, not exceeding 100 dols., for a violation of an ordinance of said city, entitled, 'An ordinance for revising and consolidating the general ordinances of the city of Chicago, passed October 23, 1865, to wit: For committing a breach of the peace, and making an improper noise and disturbance in said city, or for using threatening or abusive language towards another person tending to a breach of the peace, in violation of sect. 29, chap. 25, of said ordinances, and hereof make due return, as the law directs. Given under my hand and seal this 5th day of August, 1872.

A. H. BANYON, [Seal.]
Justice of the Peace."

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The sixth section of chapter 11 of the Charter of Chicago (Gary's Laws, p. 114), declares as follows: "In all prosecutions for any violation of any ordinance, by law, police or other regulations, the first process shall be a summons, *unless oath or affirmation be made for a warrant as in other cases,*" and by section 1, of chapter 33 of Ordinances (Gary's Laws, 306), it is provided that the several members of the police force "shall have power to arrest all persons in the city found in the act of violating any law or ordinance, or aiding and abetting in any such violation." It is clear, beyond doubt, that there was not the slightest authority in Scanlan and the deceased to arrest the prisoner, unless it can be found in the supposed writ or warrant, which the Court excluded; and it cannot be denied that the legality of the arrest of the prisoner was a material question in determining the character of the homicide, for it is a well established rule that where

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persons have the authority to arrest, and are resisted and killed in the proper exercise of such authority, the homicide is murder in all who take part in such resistance; and, on the other hand, it is equally well settled that, where the arrest is illegal, the offence is reduced to manslaughter: (Foster, 270; Hale's P.C., 465.) If, therefore, it be conceded that the warrant was legal, then, inasmuch as the policemen had no authority to arrest the prisoner without it, the production of the warrant in evidence was necessary, in order to a conviction for murder. But if it was, to all intents and purposes, illegal and void, the supposed warrant, and the testimony showing its nullity, were competent and proper for the accused, in order to show that the character of the homicide was manslaughter, and not murder. We have seen that, by the express provisions of the charter of Chicago, no process of the kind in question could have been lawfully issued by the magistrate himself, without an oath or affirmation made for the warrant, as in other causes; and yet we find blanks, signed by the magistrate, put into the hands of a sergeant of police, filled out by him, and used as legal process with which to arrest the citizens of the State, with full knowledge, as we must presume, on the part of the magistrate or sergeant, that they were so put into use without the required oath, and in violation of law. Such conduct is reprehensible in the highest degree, and it is a matter of no astonishment that such tragical results followed. But, when so filled out, the paper was an absolute nullity. It did not issue, in the ordinary course of justice, from a court or magistrate. It did not issue from the magistrate at all; because when it went from his control, it contained no authority, express or implied, to arrest and imprison Rafferty, or anybody else. The law on this subject is clear and explicit. "But if the process be defective in the form of it, as, if there be a mistake in the name of the person on whom it is to be executed, *or if the name of such person, or of the officer, be inserted without authority, or after the issuing of the process, or if the officer exceed his authority, the killing of the officer, in such case by the party, would be manslaughter only:*" (2 Archbold's Criminal Practice, P. C. 342.) "It is a general rule that when persons have authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance:" (Foster, 270.) "But three things are to be attended to in matters of this kind: the legality of the deceased's authority; the legality of the manner in which he executed it; and the defendant's knowledge of that authority; for if an officer be killed in attempting to execute a writ or warrant, invalid on the face of it, or if issued *with a blank in it, and the blank afterwards filled up, or if issued with an insufficient description of the defendant, or against a wrong person, or out of the district in which alone it could be lawfully executed; or if a private person interfere and act in a case where he has no authority, by law, to do so; or if the defendant have no knowledge of the officer's business, or of the intention*

with which a private person interferes, and the officer, or private person be resisted or killed, the killing will be manslaughter only:" (1 Hale's P. C. 465; see also, *Housin v. Barrow*, 6 Durnf. and East R., 122; *Rex v. Hood*, 1 Moody C. C., 81; 1 East P. C., 110, 111.) Roscoe, in his work on Criminal evidence, 698, says: "If the process be defective in the frame of it, as if there be a mistake in the name or addition of the party, or if *the name of the party*, or of the officer, *be inserted without authority, and after the issuing of the process*, and the officer, in attending to execute it, be killed, this is only manslaughter in the party whose liberty is invaded." Such, undoubtedly is the law, and the evidence excluded would bring the prisoner's case fully within it. His name was inserted in the warrant by the Sergeant of Police, after it had been delivered to him by the magistrate, and consequently without authority. These facts, if found by the jury, should determine the character of the homicide to be manslaughter, unless the proof showed express malice towards the deceased: (3 Greenleaf Ev., p. 106, sect. 123; *Roberts v. The State*, 14 Missouri R., 138.) No authority has been cited, and we hazard nothing in saying that none can be found, which would justify the exclusion of this evidence under the circumstances of this case. The accused had the legal right to have it go to the jury, because it was material in determining the character of the homicide. This was a question exclusively for the jury, and as to which we do not wish to be understood as expressing any opinion. For this error, the judgment will be reversed and the cause remanded.

Separate opinion by SCOTT, J. :

I cannot yield my assent to all the reasoning of the majority of the court. It seems to me the rule announced may be liable to an improper construction. An officer is not bound, at his peril, to judge whether the writ he is about to serve is, in fact, legal, or whether the magistrate who issued it was guilty of misconduct in not complying with all the provisions of the law. It would be requiring too much of him to so hold. If the opinion of the Court can be construed into holding a contrary doctrine, I do not concur in it. The general rule is, the officer may rightfully execute or assist in the execution of any process, regular on its face, without putting his life in jeopardy at the hands of offenders against the law. Any other rule would be unreasonable. There can be no question the law is, if a party in resisting an unlawful arrest commit a homicide, the crime will be manslaughter, and not murder. It is always, however, a question of fact, to be found from the evidence. In this view of the law, it would have been proper, no doubt, for the Court to have permitted the jury to consider the evidence tendered, however slight it might be, on the question whether the homicide was, in fact, committed in resisting an unlawful arrest. There is no pretence that the deceased was himself about to serve any process, and it may be the jury will find that he was not even assisting Scanlan to arrest the accused

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E. A. Small for Rafferty.

Charles H. Reed, State's Attorney, for The People.

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OXFORD CIRCUIT.

Stafford Summer Assizes, July 21 and 27, 1874.

(Before LUSH, J.)

REG. v. JOHN WILSON AND ANN WILSON.(a)

Practice—Illness of witness—Proof of deposition—Postponement of trial—Expenses of prosecution.

The deposition of a witness in a criminal prosecution who has travelled to the assize town, but is too ill to attend court for examination, may be read before the grand jury, after the illness of the witness and the due taking of the deposition has been proved to the satisfaction of the judge.

It is not essential that the proof of the deposition having been duly taken should be given by the clerk to the committing magistrate.

Upon the postponement of a trial for the recovery of a witness who is ill, the prosecutor may then be allowed the costs of the prosecution incurred up to the date of such postponement.

PRISONERS were indicted for feloniously administering to Eliza Jane Hughes, certain noxious things, with intent to procure abortion.

J. Underhill (who appeared for the prosecution) applied to the court for leave to have the deposition of Eliza Jane Hughes sent into and read before the grand jury, on the ground that she was too ill to give evidence, although she had arrived in the assize town.

A surgeon stated upon oath that the witness was confined on Wednesday last, was in a very low depressed state, and that taking her before the grand jury might cause flooding, and be dangerous to her life.

Cross-examined: He said that he last saw her yesterday evening; she was then sitting in a chair, with a pillow under her.

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

LUSH, J.—I am quite satisfied she is unable to travel, and that this is evidence enough to justify me in sending the deposition before the grand jury, although from the nature of the case it is very material that she should be able to give evidence at the trial.^(a)

The proper taking of the deposition was then duly proved by the attorney for the prosecution, who was present before the justices when the prisoners were committed.

Young objected that the clerk to the magistrates should be called to prove the deposition.

LUSH, J., referred to the Act of Parliament, 11 & 12 Vict. c. 42, s. 17, which enacts that "if it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel, or attorney, had a full opportunity of cross-examining the witnesses, then if such deposition purport to be signed by the justice by or before whom the same purport to have been taken, it shall be lawful to read such deposition as evidence on such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same." The proof given is sufficient.

The deposition was sent into the grand jury, who found a true bill; but, as the presence of the witness at the trial was deemed essential, the hearing of the case was postponed until next assizes.

On the 27th July—*Underhill* applied on behalf of the prosecutor for costs up to this time.

LUSH, J.—The case is not yet tried. You must furnish me with some authority before I can accede to your application.

Underhill cited from Roscoe's Digest of Criminal Evidence, *Reg. v. Druryhouse* (2 Cox C. C. 446). That case was followed in *Reg. v. Dooley*.^(b)

His LORDSHIP then required an affidavit, whereupon the prosecutor made one, in which he stated that he had already paid a sum of 12*l.* towards the costs of the prosecution, but that he was poor, and quite unable to defray any further expenses.

Order for costs made.

(a) In *Reg. v. Esther Hughes* (Hereford Lenten Assizes, 1873), Honyman, J., allowed the deposition of a pregnant woman, then on the eve of labour, to be sent in before the grand jury, it having been proved to the satisfaction of his Lordship, that she was too ill to travel, and the clerk to the committing magistrate having given evidence that the deposition was properly taken. (MSS.)

(b) In *Reg. v. Dooley* (Hereford Lenten Assizes, 1871), upon an affidavit by the surgeon of the county gaol that the prisoner was insane, and that his insanity was of such a character that it was very improbable that he would ever be able to plead or take his trial, Montague Smith, J., allowed the cost of the prosecution which was then necessarily abandoned: (MSS.)

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Absent
Witness—
Deposition:—
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OXFORD CIRCUIT.

Stafford Summer Assizes, July 22, 1874.

(Before LUSH, J.)

REG. v. JAMES CATON. (a)

*Manslaughter—Joint liability for acts of violence causing death—
Common purpose.*

If A. and B. agree together to assault C. with their fists, and C. receives a chance blow of the fists from either of them, both A. and B. are guilty of manslaughter. But should A., of his own impulse, kill C. with a weapon suddenly caught up, B. would not be responsible for the death, he being only liable for acts done in pursuance of the common design of himself and A.

PRISONER was indicted for the manslaughter of Henry Parker.

McMahon prosecuted.

J. Underhill defended the prisoner.

The deceased, a brewer's carter, was on the 13th of October, 1873, removing empty casks from a cellar of a beerhouse adjoining a public street. He rolled up a cask to his fellow carter above, which accidentally struck against the leg of one Allen, who was passing along the street, whereupon Allen began to quarrel with the deceased, although the latter assured him that he had not intended to hurt him, and soon Allen called the prisoner, who came out of a neighbouring house, and both went down into the cellar and beat the deceased with their fists. The other carter went down to his comrade's help, and an affray ensued, in the course of which the deceased received the fatal blow from a heavy piece of timber which was in the cellar. The evidence was conflicting as to whether this blow was given by the prisoner or by Allen. The latter was tried before Cleasby, B., at the last spring assizes, and convicted of the manslaughter.

At the close of the case for the prosecution,

LUSH, J., said that the only question for the jury was whether the prisoner struck the fatal blow. If two men concerted together to fight two other men with their fists, and one struck an unlucky blow causing death, both would be guilty of manslaughter. But if one used a knife, or other deadly weapon,

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

such as this piece of timber, without the knowledge or consent of the other, he only who struck with the weapon would be responsible for the death resulting from the blow given by it.

McMahon.—Allen called on Caton to do an unlawful act, viz., to assault Parker, and after that call a blow was given in furtherance of the common design. At the trial of Allen, who has been convicted, Cleasby, B., ruled that Allen, having invited Caton down into the cellar to beat Parker, was liable for whatever was done thereafter.

LUSH, J.—That might be so, but the converse is not a true proposition, viz., that Caton would be responsible for all that Allen did.

His LORDSHIP, in summing up, told the jury that Caton was only answerable for his own acts, and not if the other man struck the fatal blow.

Verdict, Not guilty.

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Manslaughter
—*Joint*
Liability.

OXFORD CIRCUIT.

Shrewsbury Summer Assizes, July 29th, 1874.

(Before Mr. Justice LUSH.)

REG. v. ROBERT HERBERT FINNEY.(a)

Manslaughter—Neglect of duty—Gross negligence.

To render a person liable to conviction for manslaughter through neglect of duty, there must be such a degree of culpability in his conduct as to amount to gross negligence.

PRISONER was indicted for the manslaughter of Thomas Watkins.

Hope Edwards prosecuted.

A. Young defended.

The prisoner was an attendant at a lunatic asylum. Being in charge of a lunatic, who was bathing, he turned on hot water into the bath, and thereby scalded him to death. The facts appeared to be truly set forth in the statement of the prisoner made before the committing magistrate, as follows: "I had bathed

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

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Watkins, and had loosed the bath out. I intended putting in a clean bath, and asked Williams if he would get out. At this time my attention was drawn to the next bath by the new attendant; he was asking me a question and my attention was taken from the bath where Watkins was. I put my hand down to turn water on in the bath where Thomas Watkins was. I did not intend to turn the hot water, and I made a mistake in the tap. I did not know what I had done until I heard Thomas Watkins shout out, and I did not find my mistake out till I saw the steam from the water. There is one time you cannot get water in this bath when they are drawing water at the other bath, and at other times it shoots out like a water gun when the other baths are not in use."

[It was proved that the lunatic had such possession of his faculties as would enable him to understand what was said to him, and to get out of the bath.]

A. Young.—The death resulted from accident. There was no such culpable negligence on the part of the prisoner as will support this indictment. A culpable mistake, and some degree of culpable negligence, causing death, will not support a charge of manslaughter, unless the negligence be so gross as to be reckless: (*R. v. Nokes*, 4 F. & F. 920, cited in Archbold's Cr. Pl. 17th edit. p. 640.)

LUSH, J., to jury.—To render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part. If you accept the prisoner's own statement, you find no such amount of negligence as would come within this definition. It is not every little trip or mistake that will make a man so liable. It was the duty of the attendant not to let water into the bath while the patient was therein. According to the prisoner's own account, he did not believe that he was letting the hot water in while the deceased remained there. The lunatic was, we have heard, a man capable of getting out by himself and of understanding what was said to him. He was told to get out. A new attendant who had come on this day, was at an adjoining bath and he took off the prisoner's attention. [His LORDSHIP then read the statement.]—Now, if the prisoner, seeing that the man was in the bath, had knowingly turned on the tap and turned on the hot instead of the cold water, I should have said there was gross negligence, for he ought to have looked to see; but from his own account he had told the deceased to get out and thought he had got out. If you think that indicates gross carelessness, then you should find the prisoner guilty of manslaughter; but if you think it inadvertence not amounting to culpability, or what is properly termed an accident, then the prisoner is not liable.

Verdict, Not guilty.

OXFORD CIRCUIT.

Shrewsbury Summer Assizes, July 29th, 1874.

(Before Mr. Justice LUSH.)

REG. v. WILLIAM TAYLOR.(a)

Larceny by avowterer—Proof of taking.

When a wife absconds from the house of her husband with her avowterer, the latter cannot be convicted of stealing the husband's money missed on their departure, unless the avowterer be proved to have taken some active part either in carrying away or in spending the sum stolen.

PRISONER was indicted for stealing 2l. 8s., the property of John Willett.

Purton prosecuted.

Warren defended the prisoner.

The prosecutor said that the prisoner had lodged at his house. He, Willett, went to his work on the 30th April, 1872, leaving his wife and the prisoner in the house. When he returned from his work he found that his wife and the prisoner had gone; he also missed 2l. 8s. from a drawer in the kitchen. A police officer stated that he apprehended the prisoner on the 26th July last, when the prisoner said that he did go away with the woman, but did not take the money; she took it. The wife was then called by the counsel for the prosecution, and she swore that, when she left her husband's house, she went with the prisoner. She took 2l. 8s. with her, but it was the prisoner's money, not her husband's. The money was not in the drawer. The prisoner had earned the money himself. It was less than 1l. She did not tell the magistrates the money was the prisoner's, but said she took the money. [Her statement did not correspond with that made before the justices who sent the case for trial.]

LUSH, J.—It appears that the prisoner bore no part in taking this money.

Purton.—The money was taken jointly, if both he and the wife went away with it, although she only may have carried it. "Where a stranger took the goods of the husband jointly with his wife, this was holden to be larceny in him, he being her

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

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adulterer: (*Reg. v. Tolfree*, 1 Mood. C. C. 243; *Reg. v. Featherston*, 6 Cox, C. C. 376).

LUSH, J.—The prisoner must be proved to have taken some active part either in removing or spending the money. It is obvious that the woman cannot have told the truth both before the committing justices and to day, for her statements differ; but whichever is correct, there is no sufficient evidence to justify the conviction of the prisoner.

Acquittal directed.

Verdict accordingly.

[See *Thompson's case*, 1 Den. C.C. 549; *Featherstone's case*, 1 Den. C.C. 369; *Reg. v. Berry*, 28 L. J., N.S. 70, M.C.; *Reg. v. Mutters*, 34 L.J. 54, M.C.]

OXFORD CIRCUIT.

Shrewsbury Summer Assizes, July 30th.

(Before Mr. Justice LUSH.)

REG. v. JOHN JONES.(a)

Manslaughter—Negligence—Pointing a gun.

One who points a gun at another person, without previously examining whether it be loaded or not, will, if the weapon should accidentally go off and kill him towards whom it is pointed, be guilty of manslaughter.

PRISONER was indicted for the manslaughter of Benjamin Jones.

Redman prosecuted.

A. Young and *Yates* defended.

The mother of the deceased said that he was eight years old; that she went upstairs leaving the prisoner downstairs and after a short time heard the explosion of a gun. On coming down she saw that the boy's brains had been blown out. She said "Oh Jack, you have shot the child." The prisoner did not speak. On a police constable arriving she repeated the expression, and the prisoner said, "He shot himself." The prisoner was always very kind to the boy. Another witness said that on the morning in question he (the witness) loaded the gun and went out with it, but did not discharge it, and on his return took off the cap and put it in a cap box in the cupboard in the house. He put the gun in a

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

corner of the room. Being cross-examined, he said that he could not swear that he took the cap off. A police constable stated that the prisoner, when charged in his presence with shooting the boy, said, "Do you think I have no more sense? he did it himself;" but on the road to the police station said, "The boy was playing with it and I told him to put it down, and he did so, and I picked it up and pointed it at him; he ran into the pantry, and I waited till he came out, then it went off."

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It was contended for the defence that the gun went off by accident as the prisoner was about to replace it in the corner.

LUSH, J., to the jury.—No doubt the prisoner did not intend to discharge the gun at the child. What he did was either an accident or was negligence on his part. The charge is that he so carelessly handled the gun as to occasion the death of the deceased. If a person points a gun without examining whether it is loaded or not, and it happens to be loaded and death results, he is guilty of negligence and manslaughter. Can you come to any other conclusion than that the prisoner did either in joke or otherwise point the gun at the boy? [His LORDSHIP read the evidence.]—If he held the gun pointed at the boy, and so held it until the child came out of the pantry, and it went off, what can that be but so improperly and carelessly handling the gun as to be negligence, and therefore manslaughter?

Verdict—Guilty, with a recommendation to mercy.

Sentence—'Two months' imprisonment.

[Note.—If a man finds a pistol, tries it with the rammer, and thinks it unloaded, carries it home, shows it to his wife, touches the trigger, it goes off and kills her, ruled manslaughter; yet ought to have been only accidental death. Per Holt, C.J., and Foster J: (Foster's Cr. Law, 263; Com. Dig. Tit. Justices, M. 18.)]

OXFORD CIRCUIT.

Shrewsbury Summer Assizes, July 30.

(Before Mr. Justice LUSH.)

REG. v. HARRIET RODEN.(a)

*Murder—Evidence of other deaths.**Upon the trial of a prisoner for the murder of her infant by suffocation in bed,**Held, that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which those children died.**Reg. v. Cotton (12 Cox C.C. 400), followed and confirmed.***P**RISONER was indicted for the murder of her child, Clara Roden.*J. Underhill* prosecuted.*John Rose*, at the request of the learned judge, defended.

The prisoner was a woman, crippled and very helpless from rheumatism. The deceased, an infant of nine days' old, died of suffocation while in bed with her, and on her arm, during the night.

Counsel for the prosecution tendered evidence to prove that the prisoner had had four other children who had also died in infancy at early ages. He cited *Reg. v. Cotton* (12 Cox C.C. 400), where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison; evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge from the same poison was held to be admissible.

Rose objected. The evidence tendered, although of no real legal value, would, if given, greatly prejudice the case in the minds of the jury. That admitted in *Reg. v. Cotton* pointed directly to prior acts of poisoning, but here it is not proposed to prove that the four children died from other than natural causes.

LUSH, J.—The value of the evidence cannot affect its admissibility. The principle of *Reg. v. Cotton* applies. The Lord Chief Justice and I were consulted upon the point in that case by my brother Archibald before the trial, and, having considered it, we were clearly of opinion that the evidence was admissible. I think the evidence now tendered may likewise be received.

(a) Reported by JOHN ROSE, Esq., Barrister-at-Law.

A witness then stated that the prisoner had had five children before, one five months and a quarter, one four months, and the others about three months old at death. They did not die in bed, but on the prisoner's lap, except one, and that was born dead.

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As, however, it appeared from the testimony of the surgeon that the deceased might have been accidentally killed by the mother overlaying it, or by the clothes covering it, his Lordship directed an acquittal.

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Verdict—Not guilty

[Note.—So, upon the trial of a wife for poisoning her husband with arsenic, proof of the subsequent death of three of her sons from arsenic was admitted by Pollock, C.B., with the concurrence of Alderson, B. and Talfourd, J.; (*Reg. v. Geering*, 18 L.J., N.S., M.C. 215.)]

(COURT OF QUEEN'S BENCH.)

Wednesday, April 29, 1874.

Before COCKBURN, C.J. and BLACKBURN, J.

REG. v. GUARDIANS OF STEPNEY UNION.

Criminal lunatic—Maintenance—Power of justices to adjudge settlement of lunatic—Order made by justices—"Debt, claim, or demand"—9 Geo. 4, c. 40, s. 54; 3 & 4 Vict. c. 54, s. 7; 22 & 23 Vict. c. 49, s. 1.

Where a person charged with felony has been acquitted on the ground of insanity, and is detained during pleasure, two justices of the county where the lunatic is detained may inquire into and adjudge the settlement of the lunatic, and may make an order upon the overseers or guardians of the parish where the lunatic is adjudged to be legally settled to pay such weekly sum for the maintenance of the lunatic as two justices shall from to time direct.

The service of such an order upon the guardians need not be accompanied by a statement of the grounds of chargeability and particulars of settlement.

Proceedings to enforce the payment of each such weekly sum must be commenced within the time limited by sect. 1 of 22 & 23 Vict. c. 49.

THIS was a writ of *mandamus* to the guardians of Stepney Union to pay for the maintenance of Adelaide Freedman,

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a criminal lunatic in Broadmoor Asylum, the said Freedman having a settlement in the Stepney Union.

The writ of *mandamus* recited that Adelaide Freedman was on the 24th day of November, 1869, at the Old Bailey, found insane by a jury, and the Court ordered her to be confined during Her Majesty's pleasure; that two justices of the City of London inquired into her settlement and pecuniary circumstances, and on the 21st day of December, 1869, adjudged her to be settled in the parish of St. Paul, Shadwell, within the Stepney Union, and the pauper having been sent to Broadmoor Asylum, they ordered the Stepney Union to pay to the superintendent of that asylum the sum of 14s. weekly, the same being a reasonable charge; that the lunatic was removed to the asylum on the 7th day of January, 1870; that the union had not paid the said sum, and there was due 44l. 18s. This sum the writ ordered the union to pay.

The return alleged, first, that A. Freedman was not found insane as alleged; secondly, that neither of the said justices had any jurisdiction to make such order; thirdly, that before making the order the union received no notice, and were not aware of the said inquiry. The return proceeded as follows:—

4. And we the guardians of the poor aforesaid, do further humbly certify and return to our said sovereign lady the Queen that the said supposed order of justices, mentioned and referred to in the said writ, was and is made by the said two justices, mentioned and referred to in the said writ, to the effect and in the words following, that is to say, "To the guardians of the poor of the Stepney Union, in the county of Middlesex, in which the parish of St. Paul, Shadwell, is comprised, and to the overseers of the poor of the said parish, and to each of them. London, to wit,—Whereas one Adelaide Freedman was on the 22nd day of November, in the year of our Lord 1869, at the general session of oyer and terminer of our Lady the Queen held for the jurisdiction of the Central Criminal Court, at Justice Hall, in the Old Bailey, in the suburbs of the City of London, indicted for murder, and at the same session of oyer and terminer held as aforesaid on the 24th day of the said month of November, the said Adelaide Freedman was found to be insane by a jury lawfully empanelled, whereupon the Court ordered the said Adelaide Freedman to be confined during Her Majesty's pleasure. Now we, Samuel Wilson, Esq., and Sir William Anderson Rose, Knight, being two of Her Majesty's justices of the peace in and for the City of London and the liberties thereof, in which the said Adelaide Freedman was so tried and found insane as aforesaid (no one of Her Majesty's principal Secretaries of State having otherwise directed), having now received evidence on oath touching the said several premises, do adjudge the same to be true. And we the said Samuel Wilson, Esq., and Sir William Anderson Rose, Knight, such justices as aforesaid of, in, and for the said City of London and the liberties

thereof, do now inquire into and ascertain by the best evidence and information which can be obtained under the circumstances of the personal legal disability of the said Adelaide Freedman, into the place of the last legal settlement and the pecuniary circumstances of the said Adelaide Freedman, and it now appearing to us the said justices that the said Adelaide Freedman is not possessed of sufficient property which can be applied to her maintenance, and having now received evidence on oath touching the place of the last legal settlement of the said Adelaide Freedman, do by this our order, under our hands and seals, adjudge that the said Adelaide Freedman is lawfully settled in the parish of St. Paul, Shadwell, in the county of Middlesex; and whereas the said Adelaide Freedman is now confined in Her Majesty's gaol of Newgate; and whereas, upon the making of this order, a warrant will be issued by one of Her Majesty's principal Secretaries of State for the removal of the said Adelaide Freedman from the said gaol of Newgate to the criminal lunatic asylum at Broadmoor in the county of Berks: Now we do hereby order you, the guardians of the poor of the Stepney Union, in which the said Parish of St. Paul, Shadwell, is comprised, from and immediately after the removal of the said Adelaide Freedman from the said gaol of Newgate to the Broadmoor Criminal Lunatic Asylum aforesaid, to pay on behalf of the said parish to the superintendent for the time being of the said criminal lunatic asylum, weekly and every week, the sum of 14s., the same having been proved before us to be a reasonable charge in that behalf for the maintenance of the said Adelaide Freedman in the said lunatic asylum during her confinement therein, under and by virtue of the warrant so to be issued by one of Her Majesty's principal Secretaries of State as aforesaid, or until it shall be otherwise ordered according to law. Given under our hands and seals at the Guildhall justice room in the said city, this 21st day of December, in the year of our Lord 1869.—SAMUEL WILSON (L.S.) WM. A. ROSE (L.S.).” Which said supposed order was and is illegal and bad on the face thereof by reason that it does not show that Adelaide Freedman therein mentioned, was at the time of the making of the said supposed order, kept in custody or imprisoned within the jurisdiction of the said justices who made the said supposed order, and by reason that the said supposed order does not show that it was made upon or in respect of any complaint or information made to or before the said justices who made the said supposed order, and by reason that the said supposed order does not show that we, the said guardians of the poor, had any summons or notice to appear or attend before, or did in any way appear before the said justices on their inquiry mentioned and referred to in the said supposed order into the place of the legal settlement and the pecuniary circumstances of the said Adelaide Freedman.

5. And we, the guardians of the poor aforesaid, do further humbly certify and return to our said sovereign lady the Queen,

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that the said supposed order of justices mentioned and referred to in the said writ was not duly served upon the said guardians of the Stepney Union as alleged in the same writ.

6. And we the guardians of the poor aforesaid do further humbly certify and return to our said sovereign lady the Queen, that although the said supposed order mentioned and referred to in the said list, was, in fact, made on the 21st day of December, 1869, the said supposed order has never been served upon us the guardians of the poor aforesaid by the delivery of a copy or counterpart of such supposed order, accompanied by a statement in writing setting forth the grounds of such supposed order, including the particulars of the settlement or settlements relied upon in support thereof, and that by reason of the said supposed order never having been served as last mentioned, we the said guardians of the poor aforesaid have hitherto been prevented from appealing against the said supposed order, and having the said supposed order quashed by the quarter sessions of the peace holden in and for the City of London.

7. And we the guardians of the poor aforesaid, do further humbly certify and return to our said sovereign lady the Queen that as to 25*l.* 4*s.* part of the sum of 44*l.* 18*s.* mentioned and referred to in the said writ, the same consists of thirty-six sums of 14*s.* each, supposed to have been ordered to be paid by and to have become due from us the guardians of the poor aforesaid at intervals of a week from the 14th day of January, 1870, until the 23rd day of September, 1870; that if the said thirty-six sums of 14*s.* each ever were ordered to be paid by and became due from us the guardians of the poor aforesaid, the same were debts, claims, or demands, and their total the sum of 25*l.* 4*s.*, was a debt, claim, or demand lawfully incurred by and becoming due from us the guardians of the poor aforesaid as the guardians of an union, namely, the said Stepney Union, in the county of Middlesex, after the passing of the Act made in the session of Parliament holden in the 22nd and 23rd year of the reign of our sovereign lady the Queen, to provide for the payment of debts incurred by boards of guardians in unions and parishes, and boards of management in school districts, and were so incurred, and so became due before the 29th day of September, 1870; that the half-year's accounts for the said Stepney Union ought to have been and were closed, according to the order of the Poor Law Board, up to the 25th day of March, 1870, the said 29th day of September, 1870, and the 25th day of March, 1871, respectively; that no proceedings for the recovery of the said thirty-six sums of 14*s.* each or any of them, or for the recovery of their total the said sum of 25*l.* 4*s.*, or for the recovery of any part of any such sums, were commenced within the said half-year ending the said 29th September, 1870, or within three months after the expiration of such half-year, nor has the Poor Law Board granted any extension of time for the payment of the said thirty-six sums of 14*s.* each or any of them,

or for the payment of their total the said sum of 25*l.* 4*s.*, or for the payment of any part of any such sums, nor was the said writ issued nor any application for the same made within the time so limited by the said statute as aforesaid.

8. And we the said guardians of the poor humbly submit that for the reasons and causes aforesaid, we ought not to and cannot pay to the superintendent for the time being of the criminal lunatic asylum at Broadmoor mentioned and referred to in the said writ, the sum of 44*l.* 18*s.* mentioned and referred to in the said writ, under and in pursuance of the said supposed order mentioned and referred to in the said writ, for the maintenance of the said Adelaide Freedman in the said criminal lunatic asylum.

To this return the prosecutor pleaded that the said Adelaide Freedman was found to be insane as stated in the writ of *mandamus*; that the order of justices was in the words and figures set forth in the fourth paragraph of the return, and was in full force and validity; that the justices had jurisdiction; that the guardians were duly summoned and had due notice to appear before the justices on the said inquiry; that the said order was duly served; that the said half-yearly accounts were not closed up to the 25th day of March, 1870, 29th day of September, 1870, and 25th day of March, 1871, respectively.

There was also a demurrer to the first, second, third, fourth, sixth, and seventh paragraphs of the return.

The defendants took issue on the plaintiff's second, third, fourth, fifth, sixth, and seventh pleas. And as to the fifth plea the defendants, on equitable grounds, say that after the said supposed order had been in fact made, and after the said Adelaide Freedman had been removed to and admitted into the said Broadmoor criminal lunatic asylum, to wit, on or about the 14th day of January, 1870, a copy of the said supposed order, but not accompanied by a statement in writing, setting forth the grounds of such supposed order, including the particulars of the settlement relied upon in support thereof, was served on the defendants; that the defendants, desiring and intending to appeal against the said supposed order, duly entered their appeal against the same for hearing at the general quarter sessions of the peace holden in and for the said city of London; that the said appeal duly came on to be heard at the general quarter sessions holden on the 9th day of April, 1870, before Sir Robert Walter Carden, knight, Sir Thomas Gabriel, baronet, alderman of the said city, the Right Honourable Russell Gurney, recorder of the said city, David Henry Stone, esquire, Thomas Scambler Owden, esquire, other of the aldermen of the said city, and others their fellow justices of the peace of our said lady the Queen in and for the said city of London, in which said appeal the defendants were the appellants, and Edward James Read, the clerk of the peace for the said city of London, was the nominal respondent for and on behalf of the plaintiff; that both parties duly appeared by counsel at the said

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quarter sessions; that the said nominal respondent for and on behalf of the plaintiff, by his said counsel, then and there objected to the jurisdiction of the said court to proceed in the hearing of the said appeal, on the ground that the said supposed order had not then been duly served on the defendants, by reason that the same had not been accompanied by a statement in writing, setting forth the grounds of such supposed order, including the particulars of the settlement relied upon in support thereof, and that, until such statement had been served, there was no grievance to the defendants against which they could appeal, and as to which the said court of quarter sessions were empowered to give relief; that the defendants, by their counsel, then and there agreed and admitted that no such statement had been served, and thereupon the said court of quarter sessions refused to hear the said appeal, and the said counsel for the said nominal respondent, for and on behalf of the plaintiff, then and there said that the said supposed order should be duly served on the defendants, and that although by the said supposed order the moneys therein mentioned are ordered to be paid weekly, yet, from the 9th day of April, 1870, to the 31st day of March, 1871, no application for payment, or in respect thereof, was made to the defendants; and the defendants say that, believing and relying by reason of the premises that before the plaintiff would attempt to enforce the said supposed order he would cause the same to be duly served, accompanied by such statement in writing as aforesaid, and that the defendants would thereby have the opportunity to appeal against the said supposed order to, and get the same quashed at, the general quarter sessions of the peace in and for the said city of London, they, the defendants, took no steps to remove the said supposed order by writ of *certiorari* into this honourable court, in order that the same might be quashed or otherwise to obtain the quashing of the said supposed order; that no service whatever of the said supposed order has been made on the defendants since the said 9th day of April, 1870, and that the plaintiff ought not now to be admitted to say that the said supposed order was duly served upon the defendants.

Replication to the sixth plea on equitable grounds, repeating the allegations in the foregoing replication, that the plaintiff ought not now to be admitted to say that the order was duly served upon the defendants according to and in pursuance of the statutes in such case made and provided.

Demurrer to the second plea, and joinder in demurrer to the first, second, third, fourth, sixth, and seventh paragraphs of the return.

Joinder in demurrer to the second plea, and demurrer to the equitable replications to the fifth and sixth pleas.

Joinder in demurrer to the equitable replications.

Poland (with him *O. Bowen*) for the prosecution, contended that the order made by the two justices of London was valid. Sect. 1 of 39 & 40 Geo. 3, c. 94, enacts "that in all cases where it shall be given in evidence upon the trial of any person charged with

treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the court before whom such trial shall be had, shall order such person to be kept in strict custody in such place and in such manner as to the court shall seem fit, until his Majesty's pleasure shall be known; and it shall thereupon be lawful for his Majesty to give such order for the safe custody of such person during his pleasure in such place and in such manner as to his Majesty shall seem fit," &c. Then sect. 54 of 9 Geo. 4, c. 40, provides that "in all cases where any person shall be kept in custody as an insane person by order of any court, or by his Majesty's order, subsequent thereunto, it shall and may be lawful for any two justices of the peace of the county where such person shall be so kept in custody, to inquire into and ascertain by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person, the place of the last legal settlement, and the circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order, under their hands and seals, upon such parish where they adjudge him or her to be legally settled, to pay such weekly sum for his or her maintenance in such place of custody as one of his Majesty's principal Secretaries of State shall, by writing under his hand, from time to time direct; and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county where such person shall have been apprehended; but if it shall appear that such person is possessed of such sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expenses of the maintenance of such person in the manner hereinbefore directed." To this section is added a proviso "that the churchwardens and overseers of the parish in which the justices or the major part of them shall adjudge any insane person to be settled, may appeal against such order to the general quarter sessions of the peace, to be holden for the county where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace of such county, who shall be respondent in such appeal, which appeal the justices of the peace assembled at the general quarter sessions are hereby authorised and empowered to hear and determine in the same manner as appeals against orders of removal are now heard and determined." As to prisoners who became insane during imprisonment, 3 & 4 Vict. c. 54, s. 1, provides that in such case "it shall be lawful for any two justices of the peace of the

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county, city, borough or place where such person is imprisoned, to inquire, with the aid of two physicians or surgeons, as to the insanity of such person ; and if it shall be duly certified by such justices and such physicians or surgeons that such person is insane, it shall be lawful for one of Her Majesty's principal Secretaries of State, upon receipt of such certificate, to direct, by warrant under his hand, that such person shall be removed to such county lunatic asylum, &c., as the said Secretary of State may judge proper and appoint," &c. Sect. 3 of the same Act, as to persons charged with misdemeanor, makes a provision similar to that made by 94 Geo. 3, c. 40, in cases of felony, and power is given to justices to make the same inquiry, &c., "and to make the like order for the payment of such person's maintenance as above mentioned ; a power of appeal being given by ss. 4, 5. Then sect. 7, after reciting 9 Geo. 4, c. 40, s. 54, and that it is expedient that so much of that Act as relates to the direction to be given by the Secretary of State should be repealed, enacts "that so much of the said Act as relates to such directions to be given by such Secretary of State shall be and the same is hereby repealed ; and that it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane person as last aforesaid to be legally settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall, by writing under their hands direct." Under this section the order in the present case was made, and its validity is denied by the defendants, on the ground that the Act of 9 Geo. 4, c. 40, including sect. 54, is wholly repealed by 8 & 9 Vict. c. 126, s. 1. But it was obviously not the intention of the Legislature to do away with the power to make such orders in cases of felony, whilst the power to make them in cases of misdemeanor still exists under ss. 2 and 3 of 3 & 4 Vict. c. 54 : (*Guardians, &c., of Leeds v. Guardians, &c., of Wakefield*, 7 El. & Bl. 258, was referred to.) So far as a statute is incorporated in a subsequent statute, its simple repeal does not repeal the incorporated part (*Reg. v. Smith*, L. Rep. 8 Q. B. 146) ; so that, notwithstanding the repeal of the whole of 9 Geo. 4, c. 40, by 8 & 9 Vict. c. 126, sect. 54 of the older Act may still be held in force by reason of its incorporation in sect. 7 of 3 & 4 Vict. c. 54. If the court does not adopt this view, it is submitted that sect. 7 of 3 & 4 Vict. c. 54 (above cited) contains a sufficient substantive enactment to enable two justices to make this order. It is objected, in the next place, that even if the justices had power to make the order, its service should have been accompanied with a statement of the grounds and particulars of settlement ; for by sect. 54 of 9 Geo. 4, c. 40, a right of appeal against the order is given to the general

quarter sessions "in like manner and under like restrictions and regulations as against any order of removal;" but this does not apply to the service of the order itself, but only to the appeal: (*Reg. v. Derbyshire*, 22 L. J. 147, M. C. was referred to.) The objection that the order was made *ex parte* cannot be sustained: (see *Ex parte Monkleigh*, 17 L. J. 76, M. C.) It is now too late to urge the objections contained in the equitable replications, because the order, if the justices had power to make it, continues valid until set aside on appeal. Finally, the remedy by distress against the overseers having been taken away, there is no other remedy left except that by *mandamus*. Besides any objection on this score should have been taken before the writ issued: (see *per* Lord Campbell in *Reg. v. Bristol Dock Co.*, 2 Q. B. 70.)

Sir J. B. Karlake, Q.C. (with him Edward Clarke) for the defendants.—Sect. 54 of 9 Geo. 4, c. 40, having been repealed by the Legislature, whether *per incuriam* or intentionally, the justices had no power to make the order in this case. Under that section the justices, before making the order, were to inquire into and ascertain the circumstances of the lunatic, and see whether he had sufficient property to be applied to his maintenance. It cannot be that sect. 7 of 3 & 4 Vict. c. 54, which was obviously designed to make only a partial alteration in the law, viz., as to the direction by a Secretary of State, has the effect of enabling the justices to make orders under all circumstances whatever, and no matter what the circumstances of the lunatic; yet this effect it must have if that section is held to preserve to justices the power of making such order. [COCKBURN, C.J.—That is, no doubt, a strong argument; but it is a choice of inconveniences.] It may be that the Legislature intended that in cases of felony the county where a lunatic is confined should pay for his maintenance. In the next place, even if the justices had power to make the order, it was not properly served, and is therefore inoperative. Sect. 54 of 9 Geo. 4, c. 40, assimilates the order in all respects to an order of removal, and appeal being given against it "in like manner, and under like restrictions and regulations as against any order of removal," and the justices in quarter sessions are to hear and determine it "in the same manner as appeals against orders of removal are now heard and determined": (see *Reg. v. Glamorganshire*, 13 Q.B. 561; *Reg. v. Newport*, 33 L. J. 155, M. C.) The procedure on these is now regulated by 11 & 12 Vict. c. 31, sect. 2 of which renders necessary the sending of the grounds of removal, including particulars of settlement. An appeal will not lie until the order of removal has been served, accompanied by the grounds of chargeability and the particulars of settlement: (see *Reg. v. Glamorganshire*, 8 El. & Bl. 694; and *Reg. v. Recorder of Shrewsbury*, 1 El. & Bl. 711); in the latter of which cases Lord Campbell, C.J. said (p. 721): "The service of the order is a mere nullity without the service of the notice of chargeability; till this service there is no power of removal; and the time for appealing dates from the service. That being so,

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there is no grievance until there is notice of chargeability, and there being no notice there is no right of appeal." As to the 25th l. the demand is clearly barred by sect. 1 of 22 & 23 Vict. c. 49, which enacts that "with respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half-year in which the same shall have been incurred or become due, or within three months after the expiration of such half-year, but not afterwards, the commencement of such half-year to be reckoned from the time when the last half-year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board, provided that the Poor Law Board, by their order, may, if they see fit, extend the time within which such payment shall be made, for a period not exceeding twelve months after the date of such debt, claim, or demand." In *Baker v. The Guardians of the Billericay Union* (2 H. & Colt, 645), Pollock, C. B., said, as to that enactment, "the question is whether a plea setting up the fact that the action was not commenced until after the period expired, is an answer to the action; or, in other words, whether when the Legislature has said that a debt shall be paid within a limited time, but not afterwards, an action may be brought for it, and the defendant compelled to apply to a court of equity to restrain the execution. I am clearly of opinion that when a statute says that a debt shall not be paid after a certain time, no action can be maintained for it. . . . Here the statute says that the debt shall not be paid after the time prescribed, and the common sense is that if it is not to be paid it cannot be sued for."

Poland in reply, contended that sect. 1 of 22 & 23 Vict. c. 49, was not applicable to a case where the Crown sought to enforce the performance of a statutory obligation, such not being a case of a "debt, claim, or demand." [BLACKBURN, J.—I do not see why the limitation should not apply to liabilities created by statute.] *Ward v. Lowndes* (1 El. & El. 940) was referred to.

COCKBURN, C.J.—This is a *mandamus* to the guardians of the poor of the Stepney Union to pay, in obedience to an order of two justices of the City of London, a sum of money for the maintenance of a criminal lunatic, at present in confinement in a public lunatic asylum; and there can be no doubt that if the statute of 9 Geo. 4, c. 40, were still in existence, this would be a valid order, subject to one or two subordinate points which have been raised. The main and sweeping objection to the order is taken on the ground that the Act of 9 Geo. 4, c. 40, has been repealed by 8 & 9 Vict. c. 126, s. 1. But then it is said on the part of the prosecution that the 7th section of 3 & 4 Vict. c. 54, which engrafted on the former statute certain modifications of it, although the former statute has been repealed, contains still substantive enactments sufficient to support the order which

has been made in the present case. There is no doubt that sect. 7 of 3 & 4 Vict. c. 54, was introduced not for the purpose of creating substantive enactments, but for the purpose of modifying the enactments of the prior Act of 9 Geo. 4, c. 40, s. 54. I suppose by some oversight, when the Legislature repealed the statute of 9 Geo. 4, c. 40, they had not in their minds a distinct and accurate recollection of the 7th section of 3 & 4 Vict. c. 54, of the precise language and form of that section, and thought that that section would suffice for the purpose of providing for criminal lunatics in the position in which the lunatic in the present case is placed. But the difficulties which have been pointed out are somewhat striking. The Act of 9 Geo. 4, c. 40, points out that the justices before they make the order are to find out about the pecuniary means of the lunatic. There were provisions as to appeal which must be held to have ceased to exist with the repeal of that statute unless they were by implication incorporated in and kept alive by sect. 7 of 3 & 4 Vict. c. 54. I confess I am not prepared to go the length of saying that those salutary provisions of the Act of 9 Geo. 4 are kept alive by and incorporated in the 7th section of 3 & 4 Vict. c. 54. I do not say it is not so; but I do not think it necessary for the purpose of upholding the order made under the 7th section of the latter Act, to hold that those provisions of the former Act are embodied in and kept alive by it. I should rather be inclined to think that it was by an omission or oversight on the part of those who framed the later Act, that those provisions were allowed to drop. The question to which I have applied my mind is this—to see whether there is a sufficiently substantive enactment in sect. 7 of 3 & 4 Vict. c. 54, for the purpose of the present case. I cannot adopt the view contended for by Sir John Karslake, that the Legislature intended to repeal the Act of Parliament upon which sect. 7 of 3 & 4 Vict. c. 54, is engrafted. I cannot think the Legislature intended anything so exceptional and unusual as that criminal lunatics confined in a public lunatic asylum should be left there without the parish or union in which they are settled being called on to contribute to their maintenance; and if I can find anything in sect. 7 of 3 & 4 Vict. c. 54, which will suffice for the purposes of the present case, I think I ought at once to adopt it. Now, passing over for a moment the recital in that section, after repealing a certain part of the Act of 9 Geo. 4, c. 40, s. 54, it enacts that “it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane persons as last aforesaid, to be legally settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two

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justices shall by writing under their hands direct.” Now the whole of that is complete in itself with one exception, namely, that it speaks of the justices by whom the order is to be made by reference to something else, calling them “such two justices” I think the reference is supplied by the preamble of the section which recites sect. 54 of 9 Geo. 4, c. 40, by which it was among other things enacted “that it should be lawful for the justices of the peace of the county where any person should be kept in custody as an insane person, &c.” Looking at that, the words “such two justices” in sect. 7 of 3 & 4 Vict. c. 54, receive a sufficient explanation, and it becomes clear that what the enacting part of the section refers to is the justices of the county where the criminal lunatic is kept in custody. It is true that this section does not contain the various provisions of 9 Geo. 4, c. 40, s. 54; but there is a substantive enactment, and in so important a matter, in order that the maintenance of a criminal lunatic should not be a *casus omissus*, I think that anything in that enactment which can be held applicable should be so held. I think, therefore, that sect. 7 of 3 & 4 Vict. c. 54, is sufficient for the purposes of this case. But then, it has been argued, even if this is so, there are certain conditions necessary to the enforcing of the order, and they have not been satisfied; and it has been contended that this order is analogous to an order of removal. Practically, it has the same effect, though there is no actual removal from one parish to another, because the lunatic is adjudged to be settled in and chargeable in a particular parish, though he remains in the same place of confinement. Then let us see whether there is any legislative enactment making the regulations as to poor law orders of removal applicable to such a case as the present. I do not find that there is any such enactment. The Act which was referred to (11 & 12 Vict. c. 31), modifies the previous legislation on the subject, viz., the Act of 4 & 5 Will. c. 76, s. 79 of which provided that the notice of chargeability should be accompanied by a copy of the examination. The Act of 11 & 12 Vict. c. 31, repeals that enactment, and then, in sect. 2, substitutes for the copy of the examination a statement in writing under the hands of the overseers or the guardians setting forth the grounds of removal, including the particulars of the settlement relied upon in support thereof. [His Lordship read the section.] Here the guardians could not comply with that if there is no removal. That enactment is therefore inapplicable to the present case; for if there is no removal, there cannot be any statement of the grounds of removal. The argument based on the non-compliance in this respect with the requirements of 11 & 12 Vict. c. 31, therefore fails. We come next to consider the cases which show that an appeal must be conducted in like manner with an appeal against an order of removal. These cases do not seem to me to apply in the present instance, where we are considering, not the proceedings on appeal, but the proceedings accompanying the

order and the service of the order. We come, lastly, to the point that only a portion of this sum can be recovered. I think that the prosecution have failed to meet the contention of the other side as to this. The Legislature having, by 22 & 23 Vict. c. 49, s. 1, enacted that "with respect to any debt, claim, or demand which may, after the passing of this Act, be lawfully incurred by or become due from the guardians of any union or parish, or the board of management of any school or asylum district, such debt, claim, or demand shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards, the commencement of such half year to be reckoned from the time when the last half year's account shall or ought to have been closed according to the order of the Poor Law Commissioners or Poor Law Board." The statute begins to run from the time when the order is served. I see no answer to the argument furnished by this as to this part of the money, I am, therefore, of opinion that on this our judgment must be for the defendants. As to the rest our judgment will be for the prosecution

BLACKBURN, J.—I am of the same opinion. The main question really turns on what is the proper construction of sect. 7 of 3 & 4 Vict. c. 54. As things now stand the statute of 9 Geo. 4, c. 40, is repealed *simpliciter*. This case furnishes an instance of the difficulty which frequently arises from one statute repealing another, and things happening which those who drew the statute never contemplated. The 9 Geo. 4, c. 40, s. 54, enacted that "where any person shall be kept in custody as an insane person by order of any court, &c., it shall and may be lawful for any two justices of the peace of the county where such persons shall be so kept in custody, to inquire into and ascertain, by the best legal evidence that can be procured, &c., the place of the last legal settlement, and the circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order under their hands and seals upon such parish where they adjudge him or her to be legally settled, to pay such weekly sum for his or her maintenance in such place of custody as one of his Majesty's principal Secretaries of State shall from time to time direct, &c.; but if it shall appear that such person is possessed of such sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expense of the maintenance of such person in the manner hereinbefore directed." Then there follows a power of appeal given by the same section. As that section stood, therefore, it was quite plain that two justices were to inquire into the legal settlement of the lunatic, and they were also to inquire whether he had any means, and if he had no means so that he could be supported out of his own property, then an order was to be made upon the parish to pay

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such sum as the Secretary of State should from time to time direct. At that time there was no power with regard to persons detained in custody charged with misdemeanors who had been acquitted on the ground of insanity. Then came the Act of 3 & 4 Vict. c. 54, sect. 3 of which enacted that where a person charged with misdemeanor has been found not guilty on the ground of insanity, he shall be detained, "and in all such cases two justices of the peace of the county, city, or place where such person shall have been acquitted on account of insanity, or shall be kept in custody, shall have the like power as is given in the cases before mentioned," that is, when a prisoner has become insane while in prison, "to inquire and ascertain the last legal settlement of such insane person, and also to make the like order or orders for the payment of such person's maintenance, and the other charges as above mentioned," that is, they are to have power to make an order for such weekly sum as they or any two justices shall from time to time direct. Then follows, in ss. 4 and 5, a power of appeal. So far the statute of 9 Geo. 4 was left untouched, and if matters stopped there, it would follow that the power of the two justices to make an order in the case of a person who was found insane upon a charge of felony would have been the same as formerly, namely, they would have been obliged to make an order on the place of settlement of the lunatic to pay such sum as one of the Secretaries of State might under his hand from time to time direct. But then, certainly in a very clumsy and inartificial way, perhaps, to be accounted for by the supposition that the clause was put in in committee after the Bill had been drawn, sect. 7 of 3 & 4 Vict. c. 54, after reciting sect. 54 of 9 Geo. 4, c. 40, and that it is expedient that so much of that Act as relates to the direction to be given by a Secretary of State should be repealed, and other provisions made in place thereof, enacts "that so much of the said Act as relates to such directions to be given by such Secretary of State shall be, and the same is hereby repealed; and that it shall be lawful for such two justices, by order under their hands, to direct the overseers of the parish in which they shall adjudge such insane person as last aforesaid, to be legally settled, or in case such parish shall be comprised in a union declared by the Poor Law Commissioners, or shall be under the management of a board of guardians established by the Poor Law Commissioners, then the guardians of such union or parish, as the case may be, to pay such weekly sum for the maintenance of such person as they or any such two justices shall by writing under their hands direct." Taking it as it stood thus, it would appear clearly that the part of sect. 54 of the statute of Geo. 4, which said that the payment of the weekly sum was to be as a Secretary of State should, from time to time, direct, was repealed, and the cases of persons acquitted of misdemeanor and of felony on the ground of insanity were placed on precisely the same footing. Then comes the substantial difficulty, namely, that in the subsequent Act of

8 & 9 Vict. c. 126, the statute of 9 Geo. 4 is altogether repealed *simpliciter*: what under these circumstances it was the intention of the Legislature to express, is an extremely embarrassing question. If it were necessary to decide whether a power of appeal were given, and under what circumstances, I should require a great deal more time to consider before giving a final opinion, more especially after what my Lord has said. At present the inclination of my opinion is not quite the same as that of the Lord Chief Justice. The present inclination of my opinion as to the effect of sect. 7 is this:—when we find in sect. 7 that the former enactments of the statute 9 Geo. 4, are to be altered in some respects, and when so altered, we find that such two justices shall make the order for such sum as the justices may think fit, I think that, if necessary, it should be considered in the same way as if they had altered the enactments of 9 Geo. 4 and all were re-enacted with the alteration in the words of sect. 7; so that according to my view, the effect of sect. 7 would be really this: Two justices are to make the inquiry, as in 4 Geo. 4, and if they find that the lunatic has no means of his own, they will then make an order to pay such a sum as two justices may appoint, subject to an appeal, exactly as in the Act of Geo. 4. That is, taking the words and expanding them, and giving the like effect to them as Lord Coke said of Littleton's "et cæteras," namely, that in his "et cæteras" much is implied (Co. Litt. 173 C). No doubt we do imply a good deal on this construction, but this is the best opinion I can form upon the matter. The order is to be made subject to appeal, which appeal is to be subject to all the same restrictions and regulations as an appeal against an order of removal. In the present case, a valid order having been made and served, there is an objection raised that the order is inoperative, because no grounds of chargeability and particulars of settlement were served with it. I think, as soon as the mode in which the grounds of chargeability and the necessity of sending them as provided by the Legislature is looked at, the objection will be found to be grounded on a misapprehension, and that we are not embarrassed by this ground of objection at all. The old enactment was sect. 79 of 4 & 5 Will. 4, c. 76, the Poor Law Act, which provided that the pauper should not be actually removed under any order of removal from any parish by reason of his being chargeable to or relieved therein, until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy of the order of removal and of the examination upon which such order was made, shall have been sent by post or otherwise by the overseers of the parish obtaining such order to the overseers of the parish to whom such order shall be directed. That was the provision, and the construction put upon it—whether rightly or wrongly—was that, inasmuch as the making of the order of removal was in itself no hardship upon nor caused any wrong at all to the parties, it was only when it had been served under such circumstances as made the removability follow from it

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that there was a grievance; and it was held that there could be no notice of appeal until not only the order of removal was served, but, as the law then stood, accompanied also by a copy of the examination upon which such order was made. Then, by a subsequent Act—11 & 12 Vict. c. 31—the sending of the examination was done away with, and instead of it, sect. 2 provided that the grounds of removal, including particulars of settlement, should be sent. The consequence remained, that notice of appeal could not be given till these grounds were served with the order of removal, because there was no grievance until the person could be removed. As to the time of appeal, there were a great many regulations, to which I need not now refer. The argument, as I understand it, of Sir John Karslake is this, that inasmuch as the appeal in the present case is to be subject to all the rules and regulations of an appeal against an order of removal, and as there is a rule or regulation which says that the order of removal shall be no grievance in itself until it has been served with grounds of removal and particulars of settlement, so the order of maintenance cannot be operative until it has been served with grounds of chargeability and particulars of settlement. But in the present case the lunatic never can be removed. She has been detained in prison. It is an order of maintenance, not of removal, consequently all the enactments that apply to the time when the lunatic pauper may be removed under ordinary circumstances, and what may constitute a grievance against which there might be an appeal, do not apply. There was here a grievance as soon as the order was served; and, therefore, I think that the cases which have been cited in no way touch the present case, and that the absence of the grounds of chargeability is no reason at all why the order should not be enforced. With reference to the fact that the quarter sessions decided the other way, and were wrong in so doing, and the fact of their having been induced so to do by the learned counsel on behalf of his client, that does not really amount to an estoppel. I cannot understand upon what principle it is said that the facts stated in these equitable replications are an objection on the return to the *mandamus*. If there had been any case of that kind made when the rule was asked for, namely, that the one party had induced the quarter sessions to decide wrongly, and the other had been in this way tricked out of their appeal, that might have been an excellent reason for saying that we would not grant the *mandamus*; but it is no answer after the *mandamus* has been granted. The only other question is this, whether the statute 22 & 23 Vict. c. 49, s. 1, is a bar to that portion of the claim to which it is pleaded. I think it is so. The effect of that enactment is that when demands or claims are made against a parish, they must be paid within three months after the six months within which they accrue. The object of the enactment is to prevent stale demands being made upon the ratepayers. Mr. Poland endeavoured to make out that this must be applied only to things arising on contract, but the words “claim or

demand " would cover everything, and therefore I see no reason at all why a demand or claim like the present should not be paid as promptly within the nine months as any other. The effect of the statute is, that if you commence litigation to recover it within nine months, then they cannot avoid it by delaying you by process of law; but if you do not commence litigation within nine months, the claim is barred. In the present case, as to 25*l.*, litigation was not commenced in time, and consequently, as to that sum, I think they are barred. As to costs, 6 & 7 Vict. c. 67, s. 1, enacts that, on giving judgment on demurrer in the case of a *mandamus*, "it shall be lawful for the said court respectively, and they are hereby required in and by their said judgment, to award costs to be paid to the party in whose favour they shall thereby decide by the other party." The effect of that is that the prosecution are entitled to their costs; but on the taxation the defendants will be allowed costs as to those demurrers on which they have succeeded.

Judgment accordingly.

Attorney for the prosecution, *Solicitor to the Treasury.*

Attorney for the defendants, *Sweepstone.*

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APPENDIX.

STATUTES AND PARTS OF STATUTES AFFECTING THE CRIMINAL LAW,

PASSED IN THE SESSION OF PARLIAMENT OF 1871.

CRIMINAL LAW AMENDMENT (VIOLENCE, THREATS, &c.) ACT.

34 & 35 VICT. CAP. 82.

An Act to amend the Criminal Law relating to Violence, Threats, and Molestation.—[29th June, 1871.]

BE it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows :

Sect. 1. Every person who shall do any one or more of the following acts, that is to say,

Penalty for threats, molestations, and obstruction.

- (1.) Use violence to any person or any property.
 - (2.) Threaten or intimidate any person in such manner as would justify a justice of the peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace.
 - (3.) Molest or obstruct any person in manner defined by this section, with a view to coerce such person,—
 - (1.) Being a master to dismiss or to cease to employ any workman, or being a workman to quit any employment or to return work before it finished ;
 - (2.) Being a master not to offer or being a workman not to accept any employment or work ;
 - (3.) Being a master or workman to belong or not to belong to any temporary or permanent association or combination ;
 - (4.) Being a master or workman to pay any fine or penalty imposed by any temporary or permanent association or combination ;
 - (5.) Being a master to alter the mode of carrying on his business, or the number or description of any persons employed by him,
- shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months.

A person shall, for the purposes of this Act, be deemed to molest or obstruct another person in any of the following cases ; that is to say,

- (1.) If he persistently follow such person about from place to place :
- (2.) If he hide any tools, clothes, or other property owned or used by such person, or deprive him of or hinder him in the use thereof :

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(3.) If he watch or beset the house or other place where such person resides or works, or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follow such person in a disorderly manner in or through any street or road.

Nothing in this section shall prevent any person from being liable under any other Act, or otherwise, to any other or higher punishment than is provided for any offence by this section, so that no person be punished twice for the same offence.

Provided that no person shall be liable to any punishment for doing or conspiring to do any act on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing as hereinbefore mentioned.

Legal Proceedings,

Summary pro-
ceedings for
offences,
penalties, &c.

2. All offences under this Act shall be prosecuted under the provisions of the Summary Jurisdiction Acts.

Provided as follows :—

1. The "Court of Summary Jurisdiction," when hearing and determining an information or complaint, shall be constituted in some one of the following manners; (that is to say,)

(a) In England,

(i.) In any place within the jurisdiction of a metropolitan police magistrate or other stipendiary magistrate, of such magistrate or his substitute :

(ii.) In the city of London, of the Lord Mayor or any alderman of the said city :

(iii.) In any other place, of two or more justices of the peace sitting in petty sessions.

(b.) In Scotland, of the sheriff of the county or his substitute.

(c.) In Ireland,

(i.) In the police district of Dublin metropolis, of a divisional justice :

(ii.) In any other place, of a resident magistrate.

2. The description of any offence under this Act in the words of such Act shall be sufficient in law.

3. Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or prosecutor.

Appeal to
quarter ses-
sions in Great
Britain.

3. In England and Ireland, if any party feels aggrieved by any order or conviction made by a court of summary jurisdiction on determining any complaint or information under this Act, the party so aggrieved may appeal therefrom, subject to the conditions and regulations following :

(1.) The appeal shall be made to some court of general or quarter sessions for the county or place in which the cause of appeal has arisen, holden not less than fifteen days and not more than four months after the decision of the court from which the appeal is made.

(2.) The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the court of sum-

mary jurisdiction of his intention to appeal, and of the ground 34 & 35 Vict. thereof : c. 32.

- (3.) The appellant shall, immediately after such notice, enter into a recognizance in the sum of ten pounds before a justice of the peace, with two sufficient sureties in the sum of ten pounds conditioned personally to try such appeal, and to abide the judgment of the court thereon and to pay such costs as may be awarded by the court :

*Criminal Law
Amendment
(Violence,
Threats, &c.)
Act.*

- (4.) Where the appellant is in custody the justice may, if he think fit, on the appellant entering into such recognizance as aforesaid, release him from custody.

- (5.) The court of appeal may adjourn the appeal, and upon the hearing thereof they may confirm, reverse, or modify the decision of the court of summary jurisdiction, or remit the matter to the court of summary jurisdiction with the opinion of the court of appeal thereon, or make such other order in the matter as the court thinks just, and, if the matter be remitted to the court of summary jurisdiction, the said last-mentioned court shall thereupon re-hear and decide the information or complaint in accordance with the opinion of the said court of appeal. The court of appeal may also make such order as to costs to be paid by either party as the court thinks just.

4. In Scotland it shall be competent to any person to appeal against any order or conviction under this Act to the next Circuit Court of Justiciary, or where there are no circuit courts to the High Court of Justiciary at Edinburgh, in the manner prescribed by and under the rules, limitations, conditions, and restrictions, contained in the Act passed in the twentieth year of the reign of His Majesty King George the Second, chapter forty-three, in regard to appeals to circuit courts in matters criminal, as the same may be altered or amended by any Acts of Parliament for the time being in force.

*Appeal in
Scotland as
prescribed by
20 Geo. 2,
c. 43.*

All offences under this Act shall be prosecuted by the procurator fiscal of the county.

5. A person who is a master, father, son, or brother of a master in the particular manufacture, trade, or business in or in connection with which any offence under this Act is charged to have been committed shall not act as or as a member of a court of summary jurisdiction or appeal for the purposes of this Act.

*Interested
person not to
act.
6 Geo. 4, c.
129, s. 13.*

Definitions.

6. In this Act—The term Summary Jurisdiction Act shall mean as follows :

*Definition of
"Summary
Jurisdiction
Acts."*

As to England, the Act of the session of the eleventh and twelfth years of the reign of Her present Majesty, chapter forty-three, intituled "An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to Summary Convictions and Orders," and any Acts amending the same

As to Scotland, "The Summary Procedure Act, 1864 ;"

As to Ireland, within the police district of Dublin metropolis, the Act regulating the powers and duties of justices of the peace for such district or of the police of such district, and elsewhere in Ireland, "The Petty Sessions (Ireland) Act, 1851," and any Act amending the same.

7. The Acts mentioned in the schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned :

*Repeal of Acts
in schedule as
herein stated.*

34 & 35 VICT.
c. 32.
*Criminal Law
Amendment
(Violence,
Threats, &c.)
Act.*

Provided, that the repeal enacted in this Act shall not affect—
(1.) Anything duly done or suffered under any enactment hereby repealed ;
(2.) Any right or privilege acquired or any liability incurred under any enactment hereby repealed ;
(3.) Any penalty, forfeiture, or other punishment incurred in respect of any offence against any enactment hereby repealed ;
(4.) The institution of any investigation or legal proceeding or any other remedy for ascertaining, enforcing, recovering, or imposing any such liability, penalty, forfeiture, or punishment as aforesaid.

SCHEDULE.

Session and Chapter.	Title.	Extent of Repeal.
6 Geo. 4, c. 129 ...	An Act to repeal the laws relating to the combination of workmen, and to make other provisions in lieu thereof.	The whole Act.
22 Vict. c. 34 ...	An Act to amend and explain an Act of the sixth year of the reign of King George the Fourth to repeal the laws relating to the combination of workmen, and to make other provisions in lieu thereof.	The whole Act.
24 & 25 Vict. c. 100	An Act to consolidate and amend the Statute law of England and Ireland relating to offences against the person.	Section forty-one.

PREVENTION OF CRIME ACT.

34 & 35 VICT. CAP. 112.

An Act for the more effectual prevention of Crime.—[21st August, 1871.]

Whereas it is expedient to make further provisions for the effectual prevention of crime :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Preliminary.

Short title.
Commence-
ment of Act.

1. This Act may be cited as "The Prevention of Crime Act, 1871."

2. This Act shall not come into operation until the second day of November, one thousand eight hundred and seventy-one.

*Amendment of Penal Servitude Acts.*84 & 85 VICT.
c. 112.*Prevention of
Crime Act.*

3. Any constable in any police district may, if authorised so to do in writing by the chief officer of police of that district, without warrant take into custody any convict who is the holder of a licence granted under the Penal Servitude Acts, if it appears to such constable that such convict is getting his livelihood by dishonest means, and may bring him before a court of summary jurisdiction for adjudication.

Penalty on
holders of
licenses get-
ting their
livelihood by
dishonest
means.

If it appears from the facts proved before such court that there are reasonable grounds for believing that the convict so brought before it is getting his livelihood by dishonest means, such convict shall be deemed to be guilty of an offence against this Act, and his licence shall be forfeited.

4. Where in any licence granted under the Penal Servitude Acts, any conditions different from or in addition to those contained in Schedule A. of the Penal Servitude Act, 1864, are inserted, the holder of such license, if he breaks any such conditions by an act that is not of itself punishable, either upon indictment or upon summary conviction, shall be deemed guilty of an offence against this Act, and shall be liable to imprisonment for any period not exceeding three months, with or without hard labour.

Penalty on
breach of
conditions of
licence.

A copy of any conditions annexed to any licence granted under the Penal Servitude Acts, other than the conditions contained in Schedule A. of the Penal Servitude Act, 1864, shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then sitting, or if not, then within fourteen days after the commencement of the next session of Parliament.

5. Every holder of a licence granted under the Penal Servitude Acts who is at large in Great Britain or Ireland shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, and whenever he changes his residence from one police district to another shall notify such change of residence to the chief officer of police of the police district which he is leaving, and to the chief officer of police of the police district into which he goes to reside; moreover, every male holder of such a licence as aforesaid shall, once in each month, report himself at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter.

Convict hold-
ing licence to
notify resi-
dence to
police.

If any holder of a licence who is at large in Great Britain or Ireland, remains in any place for forty-eight hours without notifying the place of his residence to the chief officer of police of the district in which such place is situated, or fails to comply with the requisitions of this section on the occasion of any change of residence, or with the requisitions of this section as to reporting himself once in each month, he shall in every such case, unless he proves to the satisfaction of the court before whom he is tried that he did his best to act in conformity with the law, be guilty of an offence against this Act, and upon conviction thereof his licence may in the discretion of the court be forfeited; or, if the term of penal servitude in respect of which his licence was granted has expired at the date of his conviction, it shall be lawful for the court to sentence him to imprisonment, with or without hard labour, for a term not exceeding one year, or if the said term of penal servitude has not expired, but the remainder

84 & 85 Vict. c. 112. *Prevention of Crime Act.* unexpired thereof is a lesser period than one year, then to sentence him to imprisonment, with, or without hard labour, to commence at the expiration of the said term of penal servitude, for such a term as, together with the remainder unexpired of his said term of penal servitude, will not exceed one year.

Register of Criminals.

Register and
photographing
of criminals.

6. The following enactments shall be made with a view to facilitate the identification of criminals:

- (1.) Registers of all persons convicted of crime in the United Kingdom shall be kept in such form and containing such particulars as may from time to time be prescribed, in Great Britain by one of Her Majesty's principal Secretaries of State, and in Ireland by the Lord Lieutenant:
- (2.) The register for England shall be kept in London under the management of the Commissioner of Police of the metropolis, or such other person as the Secretary of State may appoint:
- (3.) The register for Scotland shall be kept in Edinburgh under the management of the secretary to the managers of the general prison at Perth, or such other person as the Secretary of State may appoint:
- (4.) The register for Ireland shall be kept in Dublin under the management of the Commissioners of Police for the police district of Dublin metropolis, or such other person as the Lord Lieutenant may from time to time appoint:
- (5.) In every prison, the gaoler or other governor of the prison shall make returns of the persons convicted of crime and coming within his custody; and such returns shall be in such form or forms and contain such particulars in Great Britain as the Secretary of State, and in Ireland as the said Lord Lieutenant, may require; and every gaoler or other governor of a prison who refuses or neglects to transmit such returns, or wilfully transmits a return containing any false or imperfect statement, shall for every such offence forfeit a sum not exceeding twenty pounds, to be recovered summarily:
- (6.) In Great Britain the Secretary of State, and in Ireland the said Lord Lieutenant, may make regulations as to the photographing of all prisoners convicted of crime who may for the time being be confined in any prison in Great Britain or Ireland, and may in such regulations prescribe the time or times at which and the manner and dress in which such prisoners are to be taken, and the number of photographs of each prisoner to be printed, and the persons to whom such photographs are to be sent:
- (7.) Any regulations made by the Secretary of State as to the photographing of prisoners in any prison in England shall be deemed to be regulations for the government of that prison, and binding on all persons, in the same manner as if they were contained in the first schedule annexed to the Prison Act, 1865.
- (8.) Any regulations made by the Secretary of State as to the photographing of the prisoners in any prison in Scotland, shall be deemed to be rules for prisons in Scotland, and as such shall be binding on all whom they may concern, in the same manner as if the same were made under and in virtue of the powers contained in the Prisons (Scotland) Administration Act, 1860:

- (9.) Any regulations made by the Lord Lieutenant as to the photographing of prisoners in any prison in Ireland shall be deemed to be byelaws duly made by the Lord Lieutenant, and shall be binding on all persons, in the same manner as if the same were made under the authority of the Act passed in the session holden in the nineteenth and twentieth years of the reign of Her present Majesty, chapter sixty-eight :
- (10.) Any prisoner refusing to obey any regulation made in pursuance of this section shall be deemed guilty of an offence against prison discipline, in England within the meaning of the fifty-seventh regulation in the first schedule annexed to the said Prison Act, 1865, in Scotland within the meaning of the rules for prisoners in Scotland, certified under the hand of one of Her Majesty's principal Secretaries of State, under and by virtue of the Prisons (Scotland) Administration Act, 1860, and in Ireland within the meaning of the fifteenth regulation contained in section one hundred and nine of the Act passed in the seventh year of the reign of his late Majesty King George the Fourth, chapter seventy-four :
- (11.) Any authority having power to make regulations in pursuance of this section may from time to time modify, repeal, or add to any regulations so made :
- (12.) Any expenses incurred in pursuance of this section shall be defrayed as follows ; (that is to say,)

The expense of keeping the register in London, Edinburgh, and Dublin shall, to such amount as may be sanctioned by the Treasury, be paid out of moneys provided by Parliament :

The expenses incurred in photographing the prisoners in any prison shall be deemed to be part of the expenses incurred in the maintenance of the prison, and shall be defrayed accordingly.

This section shall not apply to the prisons for convicts under the superintendence of the directors of convict prisons or to any military or naval prison.

Punishment of certain offenders.

7. Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him he shall, at any time within seven years immediately after the expiration of the sentence passed on him for the last of such crimes be guilty of an offence against this Act, and be liable to imprisonment, with or without hard labour, for a term not exceeding one year, under the following circumstance or any of them :

First. If, on his being charged by a constable with getting his livelihood by dishonest means, and being brought before a court of summary jurisdiction, it appears to such court that there are reasonable grounds for believing that the person so charged is getting his livelihood by dishonest means : or,

Secondly, If, on being charged with any offence punishable on indictment or summary conviction, and on being required by a court of summary jurisdiction to give his name and address, he refuses to do so, or gives a false name or a false address : or,

Thirdly. If he is found in any place, whether public or private, under such circumstances as to satisfy the court before whom he is brought that he was about to commit or to aid in the commission of any

34 & 35 Vict.
c. 112.

*Prevention of
Crime Act.*

Special
offences by
persons twice
convicted of
crime.

84 & 35 Vic.
c. 112.

*Prevention of
Crime Act.*

offence punishable on indictment or summary conviction, or was waiting for an opportunity to commit or aid in the commission of any offence punishable on indictment or summary conviction : or,

Fourthly. If he is found in or upon any dwelling-house, or any building, yard, or premises, being parcel of or attached to such dwelling-house, or in or upon any shop, warehouse, counting-house, or other place of business, or in any garden, orchard, pleasure ground, or nursery ground, or in any building or erection in any garden, orchard, pleasure ground or nursery ground, without being able to account to the satisfaction of the court before whom he is brought for his being found on such premises.

Any person charged with being guilty of any offence against this Act mentioned in this section may be taken into custody as follows ; (that is to say,)

In the case of any such offence against this Act as is first in this section mentioned, by any constable without warrant, if such constable is authorised so to do by the chief officer of police of his district ;

In the case of any such offence against this Act as is thirdly in this section mentioned, by any constable without warrant, although such constable is not specially authorised to take him into custody ;

Also, where any person is charged with being guilty of an offence against this Act fourthly in this section mentioned, he may, without warrant, be apprehended by any constable, or by the owner or occupier of the property on which he is found, or by the servants of the owner or occupier, or by any other person authorised by the owner or occupier, and may be detained until he can be delivered into the custody of a constable.

Person twice
convicted may
be subject to
police
supervision.

8. Where any person is convicted on indictment of a crime, and a previous conviction of a crime is proved against him, the court having cognizance of such indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.

Every person subject to the supervision of the police, who is at large in Great Britain or Ireland, shall notify the place of his residence to the chief officer of police of the district in which his residence is situated, and shall, whenever he changes such residence within the same police district, notify such change to the chief officer of police of that district, and whenever he changes his residence from one police district to another, shall notify such change of residence to the chief officer of police of the police district which he is leaving, and to the chief officer of police of the police district into which he goes to reside ; moreover every person subject to the supervision of the police, if a male, shall once in each month report himself, at such time as may be prescribed by the chief officer of police of the district in which such holder may be, either to such chief officer himself, or to such other person as that officer may direct, and such report may, according as such chief officer directs, be required to be made personally or by letter.

If any person subject to the supervision of the police, who is at large in Great Britain or Ireland, remains in any place for forty-eight hours without notifying the place of his residence to the chief officer of police of the district in which such place is situated, or fails to comply with the requisitions of this section on the occasion of any change of residence, or with the requisitions of this section as to reporting himself once in each month, he shall in every such case, unless he proves to the satisfaction of

the court before whom he is tried that he did his best to act in conformity with the law, be guilty of an offence against this Act, and upon conviction thereof he shall be subject to be imprisoned, with or without hard labour, for any period not exceeding one year.

84 & 85 Vict
c. 112.
*Prevention of
Crime Act.*

9. The rules contained in the one hundred and sixteenth section of the Act of the session holden in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six, intituled "An Act to consolidate and amend the Statute Law of England and Ireland relating to Larceny and other similar Offences," in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by this Act after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the said Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six.

*Incorporation
of certain
rules of pro-
cedure on
indictments.*

10. Every person who occupies or keeps any lodging-house, beerhouse, public house, or any other house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, and knowingly lodges or knowingly harbours thieves or reputed thieves, or knowingly permits or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein having reasonable cause for believing them to be stolen, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding ten pounds, and in default of payment to be imprisoned for a period not exceeding four months, with or without hard labour, and the court before which he is brought may, if it think fit, in addition to or in lieu of any penalty, require him to enter into recognizances, with or without sureties, and if in Scotland to find caution, for keeping the peace or being of good behaviour during twelve months: Provided that

*Penalty for
harbouring
thieves, &c.*

(1.) No person shall be imprisoned for not finding sureties or cautioners in pursuance of this section for a longer period than three months; and

(2.) The security required from a surety or cautioner shall not exceed twenty pounds:

And any license for the sale of any intoxicating liquors, or for keeping any place of public entertainment or public resort, which has been granted to the occupier or keeper of any such house or place as aforesaid, may, in the discretion of the court, be forfeited on his first conviction of an offence under this section, and on his second conviction for such an offence his license shall be forfeited, and he shall be disqualified for a period of two years from receiving any such license; moreover, where two convictions under this section have taken place within a period of three years in respect of the same premises, whether the persons convicted were or were not the same, the court shall direct that for a term not exceeding one year from the date of the last of such convictions no such licenses as aforesaid shall be granted to any person whatever in respect of such premises; and any license granted in contravention of this section shall be void.

Any licensed person brought before a court in pursuance of this section shall produce his license for examination, and if such license is forfeited shall deliver it up altogether, and if such person wilfully neglects or refuses to produce his license he shall, in addition to any other penalty

34 & 35 VICT. under this section, be liable on summary conviction to a penalty not
 a. 112. exceeding five pounds; provided that any person convicted under this
Prevention of section shall have a right to appeal against such conviction in the same
Crime Act. manner in all respects as if the said conviction had been for an offence
 committed against the provisions of the Act of the ninth George the Fourth,
 chapter sixty-one.

Penalty on
 brothel
 keepers
 harbouring
 thieves, &c.

11. Every person who occupies or keeps a brothel, and knowingly lodges or knowingly harbours thieves or reputed thieves, or knowingly permits or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein having reasonable cause for believing them to be stolen, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding ten pounds, and in default of payment to be imprisoned for a period not exceeding four months, with or without hard labour, and the court before which he is brought may, if it think fit, in addition to or in lieu of any penalty, require him to enter into recognizances, with or without sureties, as in this Act described.

Penalty on
 assaults on
 police.

12. Where any person is convicted of an assault on any constable when in the execution of his duty, such person shall be guilty of an offence against this Act, and shall, in the discretion of the court, be liable either to pay a penalty not exceeding twenty pounds, and in default of payment to be imprisoned, with or without hard labour, for a term not exceeding six months, or to be imprisoned for any term not exceeding six, or in case such person has been convicted of a similar assault within two years, nine months, with or without hard labour.

Penalty on
 dealers in old
 metals pur-
 chasing
 quantities less
 than stated in
 schedule.

13. Any dealer in old metals who either personally or by any servant or agent purchases, receives, or bargains for any metal mentioned in the first column of the schedule annexed hereto, whether new or old, in any quantity at one time of less weight than the quantity set opposite each such metal in the second column of the schedule annexed hereto, shall be guilty of an offence against this Act, and be liable to a penalty not exceeding five pounds.

For the purposes of this section the term "dealer in old metals" shall mean any person dealing in, buying, and selling old metal, scrap metal, broken metal, or partly manufactured metal goods, or defaced or old metal goods, and whether such person deals in such articles only, or together with second-hand goods or marine stores.

As to care of
 children of
 women con-
 victed of
 crimes.

14. Where any woman is convicted of a crime, and a previous conviction of a crime is proved against her, any children of such woman under the age of fourteen years who may be under her care and control at the time of her conviction for the last of such crimes, and who have no visible means of subsistence, or are without proper guardianship, shall be deemed to be children to whom in Great Britain the provisions of the Industrial Schools Act, 1866, and in Ireland the provisions of the Industrial Schools (Ireland) Act, 1868, apply, and the court by whom such woman is convicted, or two justices or a magistrate, shall have the same power of ordering such children to be sent to a certified industrial school as is vested in two justices or a magistrate by the fourteenth section of the Industrial Schools Act, 1866, and by the eleventh section of the Industrial Schools (Ireland) Act, 1868, in respect of the children in the said sections described.

Amendment of Criminal Law in certain Cases.

Evidence of
 vagrancy and

15. Whereas by the fourth section of the Act passed in the fifth year of the reign of King George the Fourth, chapter eight-three, intituled "An

Act for the punishment of idle and disorderly persons, and rogues and vagabonds, in that part of Great Britain called England," it is, amongst other things, provided that every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony, shall be deemed a rogue and vagabond, and may be apprehended and committed to prison with hard labour for any time not exceeding three calendar months: And whereas doubts are entertained as to the construction of the said provision, and as to the nature of the evidence required to prove the intent to commit a felony: Be it enacted, firstly, the said section shall be construed as if instead of the words "highway or place adjacent" there were inserted the words "or any highway or any place adjacent to a street or highway;" and, secondly, that in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justices of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony; and the provisions of the said section, as amended by this section, shall be in force in Scotland and Ireland. For the purposes of this section, in Scotland the word felony shall mean in any of the pleas of the Crown, any theft, which in respect of aggravation, or of the amount in value of the money, goods, or things stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing.

34 & 35 VICT.
c. 112.

*Prevention of
Crime Act.*

amendment of
Vagrant Act.

16. Any constable may, under the circumstances hereafter in this section mentioned be authorised in writing by a chief officer of police to enter, and if so authorised may enter, any house, shop, warehouse, yard, or other premises in search of stolen property, and search and seize and secure any property he may believe to have been stolen, in the same manner as he would be authorised to do if he had a search warrant, and the property seized, if any, correspond to the property described in such search warrant.

Power to
search for
stolen
property.

In every case in which any property is seized in pursuance of this section the person on whose premises it was at the time of seizure, or the person from whom it was taken if other than the person on whose premises it was, shall, unless previously charged with receiving the same knowing it to have been stolen, be summoned before a court of summary jurisdiction to account for his possession of such property, and such court shall make such order respecting the disposal of such property, and may award such costs as the justice of the case may require.

It shall be lawful for any chief officer of police to give such authority as aforesaid in the following cases, or either of them:—

First. When the premises to be searched are, or within the preceding twelve months have been, in the occupation of any person who has been convicted of receiving stolen property or of harbouring thieves: or

Second. When the premises to be searched are in the occupation of any person who has been convicted of any offence involving fraud or dishonesty, and punishable by penal servitude or imprisonment:

And it shall not be necessary for such chief officer of police on giving such authority to specify any particular property, but he may give such authority if he has reason to believe generally that such premises are being made a receptacle for stolen goods.

84 & 35 Vict.
c. 112.

*Prevention of
Crime Act.*

As to legal
proceedings to
be taken
before courts
of summary
jurisdiction.

Legal Proceedings.

17. Any offence against this Act may be prosecuted before a court of summary jurisdiction, as follows :

In England, in manner directed by the Act of the session of the eleventh and twelfth year of the reign of Her present Majesty, chapter forty-three, intituled, " An Act to facilitate the performance of the duties of justices of the peace out of sessions within England and Wales with respect to summary convictions and orders," and any Act amending the same :

In Scotland, under the provisions of the Summary Procedure Act, 1864, and any Act amending the same :

In Ireland, within the police district of Dublin metropolis, according to the provisions of the Act regulating the powers and duties of justices of the peace for such district, or of the police of such district, and elsewhere in Ireland in manner directed by the Petty Sessions (Ireland) Act, 1851, and any Act amending the same :

" Court of summary jurisdiction " shall in this Act mean and include any justice or justices of the peace, sheriff or sheriff substitute, metropolitan police magistrate, stipendiary or other magistrate, or officer, by whatever name called, to whom jurisdiction is given by the Acts in this section mentioned, or any Acts therein referred to, or to proceedings before whom the provisions of such Acts are or may be made applicable.

Provided as follows :—

1. The " Court of Summary Jurisdiction," when hearing and determining an information, complaint, or other proceeding in respect of an offence against this Act, shall be constituted in some one of the following manners : that is to say, in England, either of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions, or of one of the magistrates hereinafter mentioned, sitting alone or with others at some court or other place appointed for the administration of justice ; that is to say, the Lord Mayor, a metropolitan police magistrate, a stipendiary magistrate, or some other officer or officers for the time being empowered by law to do alone or with others any act authorised to be done by more than one justice of the peace ; and in Scotland, of two or more justices of the peace sitting as judges in a justice of the peace court, or of one of the magistrates hereinafter mentioned, sitting alone or with others at some court or other place appointed for the administration of justice ; that is to say, the sheriff or sheriff substitute of the county, or the provost or other magistrate of a royal burgh, or some other officer or officers for the time being empowered by law to do alone or with others any act authorised to be done by more than one justice of the peace ; and all necessary powers and authorities are hereby conferred upon such court in Scotland ; in Ireland, within the police district of Dublin metropolis, of one of the divisional justices of the said district sitting at a police court within the said district ; and elsewhere, of a stipendiary magistrate sitting alone or with others, or of any two or more justices of the peace sitting in petty sessions at a place appointed for holding petty sessions.

2. The description of any offence against this Act in the words of this Act shall be sufficient in law.

3. Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in

the information or complaint, and if so specified or negatived no proof in relation to the matters so specified or negatived shall be required on the part of the informant or prosecutor or complainant.

4. Where any offence against this Act involves the forfeiture of a licence granted under the Penal Servitude Acts, the court by whom the offender is convicted may commit him to any prison within its jurisdiction, there to remain until he can conveniently be removed to some prison in which convicts under sentence of penal servitude may lawfully be confined, in order that he may there undergo the term of penal servitude to which he is liable under the said Penal Servitude Acts or some of them ; and any person so committed may be kept to hard labour.

5. Any person accused of an offence against this Act may be remanded from time to time by the court before whom he is brought for the purpose of enabling evidence to be obtained against him, or for any other just cause.

6. No warrant or conviction in respect of any offence against this Act shall be quashed for want of form, and the court before whom any question relating to the validity of any such warrant or conviction is brought may amend such warrant or conviction if it is of opinion that there was sufficient evidence before the court by whom the warrant was issued or conviction made to justify the issue of such warrant or making of such conviction.

7. All penalties imposed under this Act in Scotland may, unless it is otherwise provided, in default of payment, be enforced by imprisonment for a term to be specified in the judgment or sentence of the court, but not exceeding three calendar months ; and all penalties imposed and recovered under this Act in Scotland shall be paid to the clerk of the court, and by him accounted for and paid to the Queen's and Lord Treasurer's Remembrancer in behalf of Her Majesty.

All penalties imposed under this Act in Ireland shall be applied according to the Fines (Ireland) Act, 1851, or any Act amending the same.

18. A previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted.

Evidence of
previous
conviction.

A record or extract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer ; and in the case of a summary conviction shall consist of a copy of such conviction purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

A record or extract of any conviction made in pursuance of this section shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the united Kingdom may be proved against a prisoner in any other part of the United Kingdom ; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof.

34 & 35 Vict.
c. 112.
*Prevention of
Crime Act.*

34 & 35 VICT.
c. 112. A fee not exceeding five shillings may be charged for a record of a conviction given in pursuance of this section.

Prevention of
Crime Act.

The mode of proving a previous conviction authorised by this section shall be in addition to and not in exclusion of any other authorised mode of proving such conviction.

Evidence in
cases of receiving stolen
property.

19. Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such persons knew the property to be stolen which forms the subject of the proceedings taken against him.

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen; provided that not less than seven days notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

Definitions.

Interpretation: "Penal
Servitude
Acts;"
"Crime;"
"Offence;"
"Indictment;"
"Police district;" "Chief
officer of
police;"
"Lord
Lieutenant"

20. The expression "the Penal Servitude Acts" means, as the case requires, the Penal Servitude Acts, 1853, 1857, and 1874, or any of them.

The expression "crime" means, in England and Ireland, any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under the fifty-eighth section of the Act passed in the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-six; and in Scotland, any of the pleas of the Crown, any theft which, in respect of any aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing, falsehood, fraud, and wilful imposition, uttering base coin, or the possession of such coin with intent to utter the same.

The expression "offence" means any act or omission which is not a crime as defined by this Act, and is punishable on indictment or summary conviction.

The expression "indictment" shall in Scotland include criminal letters and criminal libel.

The expression "police district" means—

In England,—

- (1.) The city of London and the liberties thereof;
- (2.) The metropolitan police district;
- (3.) Elsewhere in England, any county, riding, part, division, or liberty of a county, borough, burgh, city, town, place, or

union, or combination of places maintaining a separate police force; and all the police under one chief constable shall be deemed to constitute one force for the purposes of this definition :

34 & 35 VICT.
c. 112.

*Prevention of
Crime Act.*

In Scotland,—

Any county, city, burgh, town, place, or combination of places maintaining a separate police force; and all the police under one chief constable shall be deemed to constitute one force for the purposes of this definition :

In Ireland,—

(1.) The police district of Dublin metropolis :

(2.) Elsewhere in Ireland, any district, whether city, town, or county, over which is appointed a sub-inspector of the Royal Irish Constabulary.

The expression “chief officer of police” means—

In England,—

(1.) In the city of London and the liberties thereof, the commissioner of City police :

(2.) In the metropolitan police district, the commissioner of police of the metropolis :

(3.) Elsewhere in England, the chief constable, or head constable, or other officer, by whatever name called, having the chief command of the police in the police district in reference to which such expression occurs :

In Scotland,—

The chief constable, or head constable, or other officer, by whatever name called, having the chief command of the police in the police district in reference to which such expression occurs :

In Ireland,—

(1.) In the police district of Dublin metropolis, either of the commissioners of police for the said district :

(2.) Elsewhere in Ireland, in any other police district, the sub-inspector of the Royal Irish Constabulary :

Any act or thing by this Act authorised to be done by the chief officer of police may be done by any person authorised by him in that behalf.

The expression “Lord Lieutenant” includes the Lords Justices or other chief governors or governor of Ireland for the time being.

Repeal of Acts and Saving Clause.

21. From and after the time at which this Act comes into operation, there shall be repealed, Repeal of
Acts.

(1.) The Habitual Criminals Act, 1869 :

(2.) So much of the fourth section of the Penal Servitude Act, 1864, as requires the holder of a license to report himself.

Provided that the repeal enacted in this Act shall not affect any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation, or any prosecution or other remedy or legal proceeding for enforcing or recovering any such penalty, forfeiture, or other punishment as aforesaid.

22. This Act shall not affect the infliction of capital punishment in any case where capital punishment would have been inflicted if this Act had not passed. Saving as to
capital
punishment.

34 & 85 Vict.
c. 112.

SCHEDULE above referred to.

*Prevention of
Crime Act.*

Column 1. List of Metals.	Column 2. Quantities of not less than
Lead, or any composite the principal ingredient of which is lead	112 lbs.
Copper, or any composite the principal ingredient of which is copper	56 lbs.
Brass, or any composite the principal ingredient of which is brass	56 lbs.
Tin, or any composite the principal ingredient of which is tin	56 lbs.
Pewter, or any composite the principal ingredient of which is pewter	56 lbs.
German silver, or spelter, or any composite the principal ingredient of which is German silver or spelter	56 lbs.

STATUTES AND PARTS OF STATUTES AFFECTING
THE CRIMINAL LAW,

PASSED IN THE SESSIONS OF PARLIAMENT OF 1873.

MUNICIPAL CORPORATIONS EVIDENCE ACT.

36 & 37 VICT. CAP. 33.

An Act to facilitate the Proof of Byelaws and Proceedings of Municipal Corporations in England and Wales.—[7th July, 1873.]

WHEREAS it is expedient to facilitate the proof the byelaws and proceedings of municipal corporations in England and Wales :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited for all purposes as the "Municipal Corporations Evidence Act, 1873." Short title.

2. The production of a written or printed copy of any byelaws made by the council of a borough, either under the Municipal Corporations Act of the fifth and sixth of William the Fourth, chapter seventy-three, or under any present or future general or local Act of Parliament, authenticated by the common seal of the borough, shall be evidence, until the contrary is proved, of the due making and existence of such byelaws, and, if so stated in such copy, of the same byelaws having been approved and confirmed by the authority whose approval or confirmation is or shall be required to the making or enforcing of such byelaws in all legal proceedings, without further proof of the making of such byelaws, or of such approval or confirmation or of the said common seal. Proof of byelaws.

3. Any minute of proceedings at meetings of the council, or of committees of the council, if signed by any person purporting to be the mayor of the borough or the chairman of a meeting of the council or committee of the council, either at the meeting of the council or committee of the council at which such proceedings took place, or at the next ensuing meeting of the council or committee of the council, shall be receivable in evidence in all legal proceedings, without further proof ; and, until the contrary is proved, every meeting of the council or committee of the council in respect of the proceedings of which minutes have been so made shall be deemed to have been duly convened and held, and all the members thereof to have been duly qualified, and, when such proceedings are proceedings of committees, that such committees have been duly and regularly constituted, and had power to deal with the matters referred to in such proceedings. Proofs of proceedings of council and its committees.

4. If any person shall forge the seal or signatures of any document in Punishment

36 & 37 VICT. c. 83. this Act mentioned or referred to or shall tender in evidence any such document with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall upon conviction be liable to imprisonment for any term not exceeding three years nor less than one year with hard labour.

Municipal Corporations Evidence Act.

for forging seal for signatures.
Interpretation of "borough."

5. The word "borough" in the construction of this Act shall mean city, borough, or town corporate.

EXTRADITION ACT, 1873.

36 & 37 VICT. CAP. 60.

An Act to amend the Extradition Act, 1870.—[5th August, 1873.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Construction of Act and short title, 83 & 34 Vict. c. 52.
Explanation of sect. 6 of 83 & 84 Vict. c. 52.

1. This Act shall be construed as one with the Extradition Act, 1870, (in this Act referred to as the principal Act), and the principal Act and this Act may be cited together as "The Extradition Acts, 1870 and 1873," and this Act may be cited alone as "The Extradition Act, 1873."

2. Whereas by section six of the principal Act it is enacted as follows:—
"Where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime."

And whereas doubts have arisen as to the application of the said section to crimes committed before the passing of the principal Act, and it is expedient to remove such doubts, it is therefore hereby declared that—

A crime committed before the date of the order includes in the said section a crime committed before the passing of the principal Act, and the principal Act and this Act shall be construed accordingly.

Liability of accessories to be surrendered.

3. Whereas a person who is accessory before or after the fact, or counsels, or procures, commands, aids, or abets the commission of any indictable offence, is by English law liable to be tried and punished as if he were the principal offender, but doubts have arisen whether such person as well as the principal offender can be surrendered under the principal Act, and it is expedient to remove such doubts: it is therefore hereby declared that—

Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime, or of being accessory before or after the fact to any extradition crime, shall be deemed for the purposes of the principal Act and this Act to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly.

4. Be it declared, that the provisions of the principal Act relating to depositions and statements on oath taken in a foreign State, and copies of such original depositions and statements, do and shall extend to affirmations taken in a foreign State, and copies of such affirmations.

86 & 87 Vict.
c. 60.

*Extradition
Act, 1878.*

5. A Secretary of State may, by order under his hand and seal, require a police magistrate or a justice of the peace to take evidence for the purposes of any criminal matter pending in any court or tribunal in any foreign State; and the police magistrate or justice of the peace, upon the receipt of such order, shall take the evidence of every witness appearing before him for the purpose in like manner as if such witness appeared on a charge against some defendant for an indictable offence, and shall certify at the foot of the depositions so taken that such evidence was taken before him, and shall transmit the same to the Secretary of State; such evidence may be taken in the presence or absence of the person charged, if any, and the fact of such presence or absence shall be stated in such deposition.

Explanation of
sect. 14 of 88
& 84 Vict. c.
52, as to state-
ments on oath
including
affirmations.
Power of tak-
ing evidence
in United
Kingdom for
foreign crimi-
nal matters.

Any person may, after payment or tender to him of a reasonable sum for his costs and expenses in this behalf, be compelled, for the purposes of this section, to attend and give evidence and answer questions and produce documents, in like manner and subject to the like conditions as he may in the case of a charge preferred for an indictable offence.

Every person who wilfully gives false evidence before a police magistrate or justice of the peace under this section shall be guilty of perjury.

Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

6. The jurisdiction conferred by sect. 16 of the principal Act on a stipendiary magistrate, and a sheriff or sheriff-substitute, shall be deemed to be in addition to, and not in derogation or exclusion of, the jurisdiction of the police magistrate.

Explanation of
sect. 16 of 88
& 84 Vict. c.
52.

7. For the purposes of the principal Act and this Act a diplomatic representative of a foreign State, shall be deemed to include any person recognised by the Secretary of State as a consul-general to that State, and a consul or vice-consul shall be deemed to include any person recognised by the governor of a British possession as a consular officer of a foreign State.

Explanation of
diplomatic re-
presentative
and consul.

8. The principal Act shall be construed as if there were included in the first schedule to that Act the list of crimes contained in the schedule to this Act.

Addition to
list of crimes
in schedule.

SCHEDULE.

List of Crimes.

The following list of crimes is to be construed according to the law existing in England or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act:

Kidnapping and false imprisonment.

Perjury, and subornation of perjury, whether under common or statute law.

24 & 25 Vict. c. 96, &c.—Any indictable offence under the Larceny Act, 1861, or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

36 & 37 VICT.
c. 60.

*Extradition
Act, 1878.*

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-seven, "To consolidate and amend the statute law of England and Ireland relating to malicious injuries to property," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-eight, "To consolidate and amend the statute law of England and Ireland, relating to indictable offences by forgery," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter ninety-nine, "To consolidate and amend the statute law of the United Kingdom against offences relating to the coin," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the Act of the session of the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter one hundred, "To consolidate and amend the statute law of England and Ireland relating to offences against the person," or any Act amending or substituted for the same, which is not included in the first schedule to the principal Act.

Any indictable offence under the laws for the time being in force in relation to bankruptcy which is not included in the first schedule to the principal Act.

STATUTES AND PARTS OF STATUTES AFFECTING
THE CRIMINAL LAW,

PASSED IN THE SESSIONS OF PARLIAMENT OF 1874.

MIDDLESEX SESSIONS ACT.

37 VIOT. CAP. 7.

An Act to amend the Law respecting the payment of the Assistant Judge of the Court of Sessions of the Peace for the county of Middlesex, and his Deputy, and the Chairman of the Second Court at such Sessions.—[21st May, 1874.]

WHEREAS under the enactments specified in the third column of the first schedule to this Act power is given to Her Majesty to appoint an Assistant Judge of the court of the sessions of the peace for the county of Middlesex, but the provision made by the said enactments for the payment of such judge has determined by reason of the resignation of the person who recently held the office of such Assistant Judge :

And whereas under the said enactments the Assistant Judge is required, whenever the court of the sessions of the peace for the county of Middlesex divide the court, to appoint a person to preside as chairman with the justices appointed to sit apart in the second court, but no provision is thereby made for the payment of such chairman :

And whereas it is expedient to make provision, in manner herein appearing, for the payment of the said Assistant Judge and chairman, and for the appointment and payment of the deputy of such Assistant Judge :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act shall be construed as one with the enactments specified in Construction the first schedule to this Act, and, together with those enactments, may of Act. be cited as "The Middlesex Sessions Acts, 1844 to 1874," and this Act Short titles. may be cited separately as "The Middlesex Sessions Act, 1874," and each of the Acts mentioned in the first schedule to this Act may be cited separately by the short title set opposite to such Act in that schedule.

2. There shall be paid to the Assistant Judge for the time being Salary of appointed in pursuance of the Middlesex Sessions Act, 1844, the annual Assistant salary of one thousand five hundred pounds, which salary shall begin from Judge. the date of his appointment as such Assistant Judge, and shall accrue due from day to day during the time of his continuance in office, and shall be payable at such intervals, not exceeding three months, as may be from time to time determined by the Commissioners of Her Majesty's Treasury.

One moiety of such salary shall be charged on and paid out of the

37 Vict. c. 7. Consolidated Fund of the United Kingdom, and the other moiety of such salary shall be charged on and paid out of the county rate of the county of Middlesex.
Middlesex Sessions Act.

The Assistant Judge shall continue not to be entitled to receive any pension or superannuation allowance out of the Consolidated Fund or moneys provided by Parliament.

The Assistant Judge, during his continuance in office, shall not practise as a serjeant-at-law or barrister.

Deputy of Assistant Judge.

3. The Assistant Judge may, in such cases of sickness, unavoidable absence, or other occasions as may be allowed by one of Her Majesty's Principal Secretaries of State, appoint a person being a serjeant or barrister-at-law of not less than ten years standing to be his deputy, and such deputy shall have power to act as if he were Assistant Judge during such time as may in each case be allowed by the said Secretary of State, not being in any case later than the end of the business at the second sessions of the peace held next after the date of such allowance by the Secretary of State.

There shall be paid to a deputy appointed in pursuance of this section, out of moneys provided by Parliament, a sum after the rate of five guineas for every day on which he sits and acts in the court of the sessions of the peace for the county of Middlesex as Assistant Judge.

Payment of chairman of second court.

4. Where the court of the sessions of the peace for the county of Middlesex divide such court, and the Assistant judge in pursuance of section fifteen of the Criminal Justice Administration Act, 1851, appoints a person to preside as chairman with the justices appointed to sit apart in a second court, there shall be paid to the person so appointed, out of moneys provided by Parliament, a sum after the rate of five guineas for every day on which he sits and acts as such chairman.

Acts specified in second schedule repealed.

5. The Acts specified in the second schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

FIRST SCHEDULE.
Middlesex Sessions Act.

Session and Chapter.	Title of Act.	Enactment referred to in this Act.	Short Title.
7 & 8 Vict. c. 71.	An Act for the better administration of criminal justice in Middlesex.	The whole Act.	The Middlesex Sessions Act, 1844.
14 & 15 Vict. c. 55.	An Act to amend the law relating to the expenses of prosecutions, and to make further provision for the apprehension and trial of offenders in certain cases.	Sects. 14 to 17, both inclusive.	The Criminal Justice Administration Act, 1851.
22 & 23 Vict. c. 4.	An Act to amend the Act for the better administration of criminal justice in Middlesex.	The whole Act.	The Middlesex Sessions Act, 1859.

SECOND SCHEDULE.
Enactments Repealed.

37 VICT. c. 7.
*Middlesex
Sessions Act.*

Session and Chapter.	Title.	Extent of Repeal.
7 & 8 Vict. c. 71 ...	An Act for the better administration of criminal justice in Middlesex.	Sect. 8, from "and in case of sickness or unavoidable absence" down to "next but one following," both inclusive, and sect. 10.
14 & 15 Vict. c. 55	An Act to amend the law relating to the expenses of prosecutions, and to make further provision for the apprehension and trial of offenders in certain cases.	Sect. 14.
22 & 23 Vict. c. 4...	An Act to amend the Act for the better administration of criminal justice in Middlesex.	Sects. 1, 2, and 6.
35 & 36 Vict. c. 51	The Judges' Salaries Act, 1872.	So much as relates to any Assistant Judge in England.

COURTS (COLONIAL) JURISDICTION.

37 & 38 VICT. CAP. 27.

An Act to regulate the Sentences imposed by Colonial Courts where jurisdiction to try is conferred by Imperial Acts.—[30th June, 1874.]

WHEREAS by certain Acts of Parliament jurisdiction is conferred on courts in Her Majesty's colonies to try persons charged with certain crimes or offences, and doubts have arisen as to the proper sentences to be imposed upon conviction of such persons; and it is expedient to remove such doubts.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited for all purposes as the Courts (Colonial) Jurisdiction Act, 1874. Short title.

2. For the purposes of this Act,—

The term "colony" shall not include any place within the United "colony." Definition of term

37 & 38 VICT.
c. 27.

*Courts
(Colonial)
Jurisdiction
Act.*

At trials in
any colonial
courts by
virtue of
Imperial
Acts, courts
empowered to
pass sentences
as if crimes
had been com-
mitted in the
colony.

Kingdom, the Isle of Man, or the Channel Islands, but shall include such territories as may for the time being be vested in Her Majesty by virtue of an Act of Parliament for the Government of India, and any plantation, territory, or settlement situated elsewhere within Her Majesty's dominions, and subject to the same local government; and for the purposes of this Act, all plantations, territories, and settlements under a central legislature shall be deemed to be one colony under the same local government.

3. When, by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England.

PERSONATION ACT.

37 & 38 VICT. CAP. 36.

An Act to render Personation, with intent to deprive any Person of Real Estate or other property, Felony.—[30th July, 1874.]

WHEREAS it is expedient to amend the law relating to personation :

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

Personation in
order to obtain
property to be
felony.

1. If any person shall falsely and deceitfully personate any person, or the heir, executor, or administrator, wife, widow, next of kin, or relation of any person, with intent fraudulently to obtain any land, estate, chattel, money, valuable security, or property, he shall be guilty of felony, and upon conviction shall be liable, at the discretion of the court by which he is convicted, to be kept in penal servitude for life, or any period not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement.

Saving.

Offences
against this
Act not to be
tried at
general or
quarter
sessions.
Short title.

2. Nothing in this Act shall prevent any person from being proceeded against and punished under any other Act, or at common law, in respect of an offence (if any) punishable as well under this Act as under any other Act, or at common law.

3. No offence against this Act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

4. This Act may be cited for all purposes as the False Personation Act, 1874.

COURTS (STRAITS SETTLEMENTS) ACT.

37 & 38 VICT. CAP. 38.

An Act to extend the Jurisdiction of Courts of the Colony of the Straits Settlements to Certain Crimes and Offences committed out of the Colony.—
[30th July, 1874.]

WHEREAS crimes and offences have been and are committed against the persons and property of the inhabitants and others in territories in the neighbourhood of the colony of the Straits Settlements by subjects of Her Majesty, and by others resident in the said colony at the time or within a short time before the commission of such crimes and offences, and it is expedient to provide for the trial and punishment of such persons, when found in the said colony, for such crimes and offences :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Crimes and offences committed out of the said colony of the Straits Settlements at any place in the Malayan Peninsula extending southward from the ninth degree of north latitude, or in any island lying within twenty miles from the coast thereof, by any of Her Majesty's subjects, or by any person being a subject of any of the native states in the peninsula south of the said ninth degree of north latitude, but who is at the time of his committing such crime or offence resident in the said colony, or who has been so resident within six months before the commission of such crime or offence, shall be cognisable in the courts of the said colony exercising criminal jurisdiction, and shall be inquired of, tried, prosecuted, and, upon conviction, punished in such and the same manner as if the crime or offence had been committed within the said colony.

Jurisdiction
of criminal
courts of
Straits Settle-
ments ex-
tended to
offences com-
mitted out of
the colony.

2. Any person known or suspected to have committed a crime or offence within the first section of this Act may be apprehended in the said colony, and kept in custody therein in like manner as if the said crime or offence had been committed within the colony.

Apprehension
of persons
within the
colony.

PRISON AUTHORITIES ACT.

37 & 38 VICT. CAP. 47.

An Act to extend the Powers of Prison Authorities in relation to Industrial and Reformatory Schools, and for other purposes relating thereto.—
[30th July, 1874.]

WHEREAS by the Prisons Act, 1865, prison authorities are empowered to borrow money for the purposes of altering, enlarging, new building, or building prisons :

87 & 88 Vict.
c. 47.

*Prison
Authorities
Act.*

Short title.
Construction
of Act.

Power to
borrow money
for purposes
of industrial
and reforma-
tory schools.

Charge of
borrowed
moneys.

Certain
clauses of
10 & 11 Vict.
c. 16, as to
borrowing
money in-
corporated.

Special provi-
sion as to the
county and
city of
Worcester.

And whereas prison authorities have power by the Industrial Schools Act, 1866 and 1872, to contribute towards or themselves to undertake the alteration, enlargement, rebuilding, establishment, building, or purchase of the site for any industrial school, and by the Reformatory Schools Act, 1866 and 1872, to contribute towards or themselves to undertake the alteration, enlargement, rebuilding, establishment, or purchase of the site for any reformatory school, but no power is given prison authorities under the said Acts relating to industrial and reformatory schools to borrow money for the purposes of such schools:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited for all purposes as "The Prisons Authorities Act, 1874," and shall be construed, as far as is consistent with the tenor thereof, as follows; that is to say, so far as it relates to industrial schools with the Industrial Schools Act, 1866 and 1872, and so far as it relates to reformatory schools with the Reformatory Schools Acts, 1866 and 1872.

2. Subject to the provisions of the Elementary Education Act, 1870, any prison authority may, with the approval of one of Her Majesty's principal Secretaries of State, borrow money for the purpose of defraying or contributing towards the expense of altering, enlarging, rebuilding, establishing, building, or purchasing the site of any industrial or reformatory school under the said Industrial and Reformatory Schools Acts, or any of them.

3. Any moneys borrowed by a prison authority under this Act may be charged by that authority on any county rate, or rate in the nature of a county rate, borough rate, or other rate applicable to the maintenance of a prison and leviable by that authority, or on any other property belonging to that authority and applicable to the same purpose as the said rates, and shall be repaid, together with the interest due thereon, out of such rates or other property.

4. The clauses of the Commissioners Clauses Act, 1847, with the exception of the eighty-fourth clause with respect to mortgages to be created by the Commissioners, shall form part of and be incorporated with this Act, and any mortgagee or assignee may enforce payment of his principal and interest by appointment of a receiver.

In the construction of the said clauses "the Commissioners" shall mean "the prison authority."

Where a prison authority borrows any money under this Act they shall charge the rates or property out of which the moneys borrowed are payable, not only with the interest of the moneys so borrowed, but also with the payment of such further sum as will ensure the repayment of the whole sum borrowed within thirty years.

5. For the purposes of the said Industrial and Reformatory Schools Acts and this Act, the justices of the county of Worcester in quarter sessions assembled shall be deemed to be the prison authority for the county of Worcester at large, and the council of the city of Worcester shall be deemed to be the prison authority for the city of Worcester and county of the same city, anything in the Worcester Prison Act, 1867, or any other Act, notwithstanding.

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ABANDONMENT.

Parent and child—Abandonment and exposure—Father's duty—24 & 25 Vict. c. 100, s. 27.
—A mother of a child under two years of age brought it and left it outside the father's house (she not living with her husband, the father of it). He was inside the house, and she called out, "Bill, here's your child; I can't keep it. I am gone." The prisoner some time afterwards came out, stepped over the child, and went away. About an hour and a half afterwards the father's attention was again called to the child still lying in the road. His answer was, "It must bide there for what he knew, and then the mother ought to be taken up for the murder of it." When his attention was called to it again, he said "he should not touch it; those that put it there must come and take it." Later on the child was found by the police in the road, cold and stiff; but by care it was restored to animation: Held, that the father was properly convicted of abandoning and exposing the child within the meaning of the 24 & 25 Vict. c. 100, s. 27. *Reg. v. White and others. Cr.Ap.Ct. 83.*

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Abduction—Unmarried girl under sixteen—Custody or possession of father—24 & 25 Vict. c. 100, s. 55.—To support an indictment for the abduction of an unmarried girl under sixteen years of age it is not necessary to prove that the person who abducted her knew her to be under sixteen, as the person who does so is bound to ascertain her age, and if she turns out to be under sixteen, he he must take the consequences. A girl who is away from her home is still in the custody or possession of her father, if she intends to return. *Reg. v. Olifier (10 Cox C. C. 402)* followed. *Reg. v. Mycock. Willes, J. 28.*

24 & 25 Vict. c. 100, s. 55—Abduction—Motive—Evidence.—One who takes an unmarried girl under the age of sixteen years out of

the possession and against the will of her father or mother, is guilty of an offence under 24 & 25 Vict. c. 100, s. 55, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go. *Reg. v. Walter Booth. Quain, J. 231.*

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(See ADMINISTRATION.)

ADMINISTRATION.

Noxious thing—Administration to procure miscarriage—Evidence of being accessory—24 & 25 Vict. c. 100, s. 58.—A man and women were jointly indicted for feloniously administering to C. a notorious thing to the jurors unknown with intent to procure miscarriage. C. being in the family way went to the male prisoner, who said he would give her some stuff to put her right, and gave her a light coloured medicine, and told her to take two spoonfuls till she became in pain. She did so, and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L., and gave her some more of the stuff, which he said he wanted to take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. C. then began to feel pain, and told the female prisoner. Then the male prisoner told her what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C. another bottle of similar stuff in the female prisoner's presence, and told her to take it like the other. She did so, and became very ill, and next day had a miscarriage, the female prisoner attending her and providing all things: Held, that there was evidence that the stuff administered was a noxious thing within the said Act. Held, also, that there was evidence of the

female prisoner being an accessory before the fact, and a party, therefore, to the administration of the noxious thing. *Reg. v. Hollis and Blakeman.* Cr.Ap.Ct. 468.

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Arson—Setting fire to goods in a house—House catching fire therefrom—Malicious intent—24 & 25 Vict. c. 97, s. 7.—A person maliciously set fire to goods in a house with intent to injure the owner of the goods, but he had no malicious intention to burn the house or to injure the owner of it. The house did not take fire, but would have done so if the fire had not been extinguished: Held, that if the house had thereby caught fire, the setting fire to it would not have been within sect. 7 of the 24 & 25 Vict. c. 97, as under the circumstances, it would not have amounted to felony. *Reg. v. John Child.* Cr.Ap.Ct. 64.

Arson—Building—Unfinished house—24 & 25 Vict. c. 97, s. 6.—An unfinished dwelling-house of which the external and internal walls were built, and the roof covered in, and a considerable part of the flooring laid, and the walls and ceilings prepared for plastering, is a building within 24 & 25 Vict. c. 97, s. 6, the unlawfully and maliciously setting fire to which is a felony: Semble, that it is a question for the jury, whether the structure in question is a building. *Reg. v. Manning and Rogers.* Cr.Ap.Ct. 106.

Arson—Ownership of house set fire to—Intent to defraud insurance office—Evidence—24 & 25 Vict. c. 97, s. 3.—An indictment under 24 & 25 Vict. c. 97, s. 3, for setting fire to a house, shop, &c., need not allege the ownership of the house. The evidence in support of the intent to injure was, that the prisoner N. was under notice to quit, and a week before the fire was asked to leave, but did not. Of the intent to defraud, the evidence was that in 1867 he called on an agent about effecting an insurance, and that in 1871 he called on him again, and said he had come to renew his policy for 500*l.*, and paid 10*s.*:

Held, that the above evidence was sufficient to prove the intent to injure and defraud. *Reg. v. Newbould and Holdsworth.* Cr.Ap.Ct. 148.

Arson—24 & 25 Vict. c. 97, s. 7—Indictment—Want of certainty—Averment of intent—Evidence.—It is not necessary in a count in an indictment laid under sect. 7 of 24 & 25 Vict. c. 97, to allege an intent to defraud, and it is sufficient to follow the words of the section without substantially setting out the particular "circumstances" relied on as constituting the offence. Evidence of experiments made subsequently to the fire is admissible to show the way in which the building was set fire to. *Reg. v. Heseltine.* Pollock, B. 404.

Arson—Stack of straw—24 & 25 Vict. c. 97, s. 17.—The prisoner set fire to a quantity of straw placed in a lorry and left for the night in the yard of an inn on its way to market: Held, that upon these facts a conviction on an indictment, charging him with setting fire to a stack of straw, could not be sustained. *Reg. v. Charles Satchwell.* Cr. Cas.R. 449.

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24 & 25 Vict. c. 96, s. 42—Assault with intent to rob—Indictment for felony—Verdict of a misdemeanour.—Prisoners were indicted for feloniously assaulting the prosecutor with intent to rob him. The jury found them guilty of an assault, but negatived the intent charged. Held, that the prisoners could not, upon this indictment and finding, be convicted of a common assault. *Reg. v. Edward Woodhall and Hugh Wilkes.* Denman, J. 240.

Assaulting a police-constable—Resistance of removal from a house—Lawfulness of constable's use of force for the purpose—Practice—Felonious assault—Discharge of jury and conviction for a common assault, with a view to compensation.—Although a police-constable may not be bound, in the execution of his duty, to assist the occupier of a house in putting out an intruder, yet he may lawfully do so, and if he sustains violence in so doing, the party inflicting such violence, though he may not be indictable for assaulting a police-constable in the execution of his duty, will be liable to a conviction for an assault, as he cannot justify resistance to the force lawfully used to eject him. On an indictment for a felonious assault, the

jury being unable to agree as to the felonious intent, were discharged by arrangement, in order that the prisoner might plead guilty to a common assault with a view to compensation. *Reg. v. Roxburgh.* Cockburn, C.J. 8.

Indecent assault—Evidence—Contradiction of prosecutrix.—On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix, she denied on cross-examination having had intercourse with a third person, S. Held, that S. could not be called to contradict her upon this answer. This rule applies to cases of rape, attempts to commit a rape, and indecent assaults in the nature of attempts to commit a rape. *Reg. v. Holmes and Furness.* Cr.Ap.Ct. 137.

Indecent assault—Consent.—A man induced two youths above the age of fourteen years to go with him in the evening to an out-of-the-way place, where they mutually indulged in indecent practices on each others' persons. The youths were willing and assenting parties to what was done. Held, that under these circumstances a conviction for an indecent assault could not be upheld. *Reg. v. Wollaston.* Cr.Ap.Ct. 180.

Indecent assault—Consent—Submission—Child of tender years.—The definition of an assault that the act must be "against the will" of the patient implies the possession of an active will on his part. Therefore, mere submission by a child of tender years to an indecent assault without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of the criminal law. *Reg. v. Lock.* Cr.Ap.Ct. 244.

Unlawful wounding—Verdict of—14 & 15 Vict. c. 19, s. 5.—To support a verdict of guilty of unlawfully wounding, under the 14 & 15 Vict. c. 19, s. 5, the act must be done maliciously as well as unlawfully. Prisoner, who was jealous of persons going in pursuit of wildfowl, fired, while the prosecutor was on the water in his punt in pursuit of wildfowl about twenty-five yards off, to frighten and deter him from again coming into the creek for the purpose of fowling. As the prosecutor slewed his punt round he was struck by the shots from the prisoner's gun; but if he had not slewed the boat round the shot would not have struck him. Held, that conviction of the prisoner for unlawfully and maliciously wounding the prose-

cutor under sect. 5 of 14 and 15 Vict. c. 99, was supported by the evidence. *Reg. v. Ward.* Cr.Ap.Ct. 123.

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Larceny by. 19, 627.

BANKRUPTCY.

Fraudulent debtor—32 & 33 Vict. c. 62 (Bankruptcy Act, 1869), pt. 2, s. 13, sub-sects. 13 and 14—False representation—Intention to defraud—Ordinary way of trade—Admissibility of bankruptcy proceedings not affected by promise made to defendant at the time of making them.—To make the false representation fraudulent it must be made knowingly by the defendant: Where the defendant pretends to be dealing in the ordinary way of business, but is not in reality doing so, the onus is on him to satisfy the jury that he was acting honestly, and had no intention to defraud. An examination of the defendant before the Registrar of the Bankruptcy Court is admissible in criminal proceedings taken against him, although a promise was made to him, before his examination, that it would not be used against him, or filed. *Reg. v. Cherry.* Martin, B. 32.

Pleading—Indictment—Debtor's Act—Arrest of judgment—32 & 33 Vict. c. 62, s. 19.—*Quære*—whether the Court for the Consideration of Crown Cases Reserved can entertain a question as to quashing an indictment, reserved at the trial. The Debtor's Act (32 & 33 Vict. c. 62), s. 19, enacts: That in indictments for offences under that Act it shall be sufficient to set forth the substance of the offence charged in the words of the Act, specifying the offence, "without setting out any debt, act of bankruptcy, trading, adjudication, or any proceeding in, or order, warrant, or document of any court acting under the Bankruptcy Act, 1860." Held, that an indictment for misdemeanour framed upon sect. 11, sub-sect. 13, of the Act, which enacts, "that if within four months next before the presentation of a bankruptcy petition, the trader by any false representation, or other fraud, has obtained any property on credit and has not paid for the same," which merely charged "that a bankruptcy petition was presented against the defendant to the County Court, &c., upon which the defendant was adjudged

bankrupt, and that the defendant within four months before the presentation of the said petition did by certain false representations obtained from B. on credit, certain property, and has not paid for the same," was sufficient in arrest of judgment under the above statute, and also under Peel's Act (7 Geo. 4, c. 64) s. 20. *Reg. v. Watkinson*. Cr.Ap.Ct. 271.

Indictment — Pleading — Defective averment cured by verdict — Conspiracy to remove goods in contemplation of bankruptcy—Error — Debtors' Act 1869 (32 & 33 Vict. c. 62), s. 11.—Sect. 11 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), enacts that any person adjudged bankrupt shall be deemed guilty of a misdemeanor if, within four months next before the presentation of a bankruptcy petition against him, he fraudulently removes any part of his property, of the value of 10*l.* or upwards. H. was tried on an indictment charging that he and others "unlawfully and wickedly did conspire, combine, confederate and agree together contrary to the provisions of the Debtors Act, 1869, and within four months next before the presentation of a bankruptcy petition against the said H., fraudulently to remove part of the property of the said H. to the value of 10*l.* and upwards, that is to say, divers, &c., he the said H. then and there being a trader and liable to become bankrupt;" and having pleaded not guilty, was convicted and sentenced. Error having been brought on the ground that the indictment contained no allegation that H. ever was adjudged bankrupt: Held, first, that the offence of conspiracy was complete as soon as an agreement had been entered into to remove the goods in contemplation of an adjudication of bankruptcy, even though no such adjudication ever took place; secondly, that after verdict it must be taken to have been proved that the agreement was entered into in contemplation of an adjudication, though this was not averred in the indictment, such defect being cured by the verdict; thirdly, that as to aiders by verdict at common law there is no distinction between criminal and civil pleadings. *Heymann v. The Queen*. Q.B. 383.

Misdemeanor — Fraudulent removal of property by debtor—Assignment before liquidation—Debtors' Act, 1869, s. 11, sub-s. 5—Bankruptcy Act, 1869, s. 15—Bills of Sale Act.—A debtor, on the 17th of October, 1873, filed his petition for the liquidation of his affairs by arrangement, and a trustee

was duly appointed. In December, 1872, he had assigned his property to L. and W., to whom he was indebted (L. having then advanced a further sum of 350*l.* for the purpose of enabling the business to be carried on), upon trust, for the benefit of L. and W. and his scheduled creditors. There were other creditors than those scheduled. On the 14th, 16th, and 17th of October, 1873, the debtor fraudulently removed portions of the property so assigned to L. and W., and in respect of these removals he was indicted under the Debtors' Act, 1869, s. 11, sub-s. 5, for having, within four months next before the commencement of the liquidation of his affairs, fraudulently removed part of "his property," of the value of 10*l.* and upwards: Held, that the offence was not proved, for the property was not his at the time of removal, but that of L. and W., the trustees under the assignment. Secondly, that the assignment required to be registered under the Bills of Sale Act, 17 & 18 Vict. c. 36, and was inoperative against the trustee under the liquidation. *Reg. v. Creese*. Cr.Ap.Ct. 539.

Bankruptcy—Evidence—Bankrupt's depositions. The Bankruptcy Act, 1869, is so far analogous to the Bankruptcy Act, 1849, that the Courts of Bankruptcy have power to compel bankrupts to give answers to questions criminating themselves, and, therefore, on the authority of *Reg. v. Scott* (7 Cox C. C. 164), such answers are admissible in evidence against the bankrupt in a criminal prosecution. *Reg. v. Hillam*. Quain, J. 174.

Misdemeanor — Bankruptcy — Evidence — 32 & 33 Vict. c. 62, s. 11.—A debtor whose affairs were liquidated by arrangement, was indicted under 32 & 33 Vict. c. 62, s. 11, for that he knowing that false debts had been proved under the liquidation, failed for the period of a month to inform B., the trustee, thereof. The evidence was that the debtor, on the 23rd of September, 1870, filed his petition in the county court, alleging that he was unable to pay his debts, and that he was desirous of instituting proceedings for liquidation of his affairs by arrangement or composition with his creditors; that on the 10th of October, the first meeting under the petition was held, and three false debts proved with his connivance. At the first meeting of the creditors, it was resolved that a composition of 8*s.* in the pound, payable by instalments, and to be secured, should be

accepted, and B. was appointed trustee in the matter. On the 12th of October, the Registrar of the County Court certified that B. was appointed trustee, and was declared to be trustee under the liquidation by arrangement. At the second meeting of creditors on the 19th October, it was resolved that the debtors' affairs should be liquidated by arrangement, and not in bankruptcy; that the remuneration of the trustee (B.) be left to a subsequent meeting, and that the trustee should pay the moneys received by him into the H. bank: Held, that upon the evidence, B. was proved to be the trustee under the liquidation by arrangement, notwithstanding that at the first meeting, when he was originally appointed, it was resolved to accept a composition of 8s., and nothing was then resolved as to a liquidation by arrangement. *Reg. v. Beaumont. Cr.Ap.Ct. 183.*

BIGAMY.

Bigamy—Marriage before registrar—Misnomer.—In 1866, the prisoner married, and in 1872, whilst his wife was living, he married another woman in the presence of the registrar of marriages, describing himself, not as Edward Rea, his true name, but as Benjamin Rea. It did not appear whether or not the second wife at the time of the marriage knew that prisoner's name was misdescribed: Held, that the prisoner was guilty of bigamy. *Quære*, whether he would have been guilty of bigamy if both parties had known of the misnomer. *Reg. v. Rea. Cr.Ap.Ct. 190.*

Bigamy—Validity of second marriage—24 & 25 Vict. c. 100, s. 57.—Prisoner, while his second wife was alive, married a niece of his former deceased wife—the last marriage being within the prohibited degrees of affinity and void: (5 & 6 Will. 4, s. 54, s. 2.) Held, that he was guilty of bigamy. *Reg. v. Allen. Cr.Ap.Ct. 193.*

Bigamy—Bond fide belief of death of husband—24 & 25 Vict. c. 100, s. 57.—A *bond fide* belief by a wife that her husband is dead is no defence to an indictment for bigamy, unless he has been continuously absent for seven years. *Reg. v. Horton* (11 Cox C. C. 145, 670) overruled. *Reg. v. Gibbons. Brett, J. 237.*

BRIDGE.

County bridge—Damage thereto by locomotive—Repair—24 & 25 Vict. c. 70.—The Locomo-

tive Act. (24 & 25 Vict. c. 70, s. 7) enacts that where any bridge on a turnpike or other road, carried across any stream, watercourse, or navigable river; canal, or railway, shall be damaged by reason of any locomotive passing over the same, or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in, or having charge of, such navigable river, canal, or railway, or of such bridge, shall be liable to repair the damage, &c., but the same shall be repaired to the satisfaction of such proprietors, &c., by the owners or persons having charge of the locomotive at the time of the happening of the damage: Held, that this provision does not apply to bridges repairable by the inhabitants of a county. *Reg. v. Kitchener. Cr.Ap.Ct. 522.*

BURGLARY.

Burglary—Evidence of attempt to commit—What a sufficient attempt to enter.—An attempt to commit a burglary may be established on proof of a breaking with intent to rob the house, although there be no proof of an actual entry. *Reg. v. Spanner. Bramwell, B. 155.*

CONFESSION.

(See EVIDENCE.)

CONSPIRACY.

Conspiracy—Pleading—Indictment—Jurisdiction—Joinder of defendants in respect of offences unconnected with each other—Acts done out of the jurisdiction—Evidence of conspiracy—Letters which have not been answered—Evidence—Practice—Conduct of the police—Searching premises and examining the person.

On an indictment for conspiracy, it is not proper to include defendants who have not been privy to the acts relied upon as proof of the alleged conspiracy, and whose offences, whatever they may have been, are wholly separate and distinct. And if the proof of the alleged conspiracy consists of proof that the substantive crime has been committed, however legal such a course may be, it is not satisfactory (following the opinion of Lord Cranworth in *Reg. v. Rowlands* (5 Cox C. C. 497)). On an indictment in which four defendants were charged

with conspiring to incite the public to crime, and also in separate counts were charged each with conspiring with some other to commit the substantive crime: Held, that the evidence under the two heads of offence was in its nature entirely distinct; that, under the former head, only such acts as were done in public were admissible, and under the latter head, only such acts as were *inter se*. To include in the indictment defendants whose offence, if any, came under the latter head, was unfair and unjust, as tending to involve them in the odium of acts to which they were not parties. As to two of the defendants, the only evidence was of letters to a third defendant, not shown to have been answered: Held, to be no evidence of conspiracy. Acts by the defendants done in Scotland were tendered in evidence: Held, that, not being within the jurisdiction of arrest, these were not admissible in evidence. The police having, without warrant or magisterial authority, searched the residence of the defendants, and arrested them, and brought them to this country for trial, such acts were held to be unlawful. And the police having also, as they said, with magisterial authority, examined the persons of others of the defendants: Held, that such examination was unlawful. *Reg. v. Boulton and others*. Q.B. 87.

Conspiracy—Trades Union Act (34 & 35 Vict. c. 31); Criminal Law Amendment Act (34 & 35 Vict. c. 32).—An indictment for conspiracy at common law will lie against two or more persons for conspiring to commit an offence for which special provision is made by statute. The defendants, servants of a gas company under contract of service, being offended by the dismissal of a fellow servant, agreed together to quit the service of their employers, without notice and in breach of their contract of service, by reason of which the company were seriously impeded in the conduct of their business. Being indicted for a conspiracy, it was contended that the stat. 34 & 35 Vict. c. 31, having determined that no act shall be illegal merely by reason of its being in restraint of trade, and having also defined the offence of "obstructing or molesting," and otherwise determined what shall be deemed to be offences as between masters and servants, had virtually declared all other acts not to be punishable. But, held, that the provisions of the statute had not affected the common law of conspiracy, for which an indictment would lie. The questions submitted to the jury were as follows:

First. Did the defendants agree together to force the company against its will to employ a man it objected to employ? Second. If so, was this sought to be done by improper threats or molestation? Third. Molestation being anything done with improper intent, to the unjustifiable annoyance and interference with the master in the conduct of his business, and such as would be likely to have a deterring effect on a man of ordinary nerve—was a quitting of the employ without notice, and breaking of the contract of service, to the undoubtedly serious injury of the master, a molestation within the above meaning of the term? Fourth. Did the defendants agree together to force their employer to do what they desired by such a molestation? Fifth. Did the defendants endeavour to enforce their object by simultaneously breaking their contracts of service? A conspiracy may be to do an unlawful act, or to do a lawful act by unlawful means. If the jury deemed the object lawful, they would further say if the means employed were lawful or unlawful. *Reg. v. Bunn, Ray, Jones, Wilson, and Dilley*. Brett, J. 316.

Conspiracy to murder unborn infant—Evidence of conspiracy continuing after birth of infant—Proposing to murder infant expected to be born—24 & 25 Vict. c. 100, s. 4—Effect of letter proposing to murder written before birth of infant, but posted so as to arrive at destination subsequent to birth—Effect of intercepted letters.—An indictment alleging a conspiracy to murder a living infant will not be supported by evidence of a conspiracy existing previous to the birth of such infant unless the agreement and intention continue subsequently to the birth. A design by two persons, by different means, to murder a child of which a woman is pregnant, and expects soon to be delivered, is sufficiently proximate to be the subject of a conspiracy. A. wrote and put in the post-office at H., at four o'clock one afternoon, a letter addressed to B., at W., containing a suggestion for the murder of a child to which B. was expecting to give birth. The child was born at one a.m. on the following morning. The letter posted at H. would have been in the ordinary course, and was in fact delivered at the house where B. lodged at eight o'clock on the morning of the day after it was posted at H. The letter never came to B.'s hands, being intercepted by the landlady of the house: Held, on these facts, that the jury might find that the act of A. continued until the letter was delivered at the house of B., and if the letter had reached

B., that A. might properly have been convicted of soliciting and inciting B. to murder her child; and, the letter having been intercepted, that A. could be convicted of an attempt to solicit and incite B. to murder her child. *Reg. v. Elizabeth Banks and Leah Banks.* Quain, J. 393.

CONSTABLE.

(See ASSAULT.)

CONTEMPT.

Contempt of court—Speeches at public meetings—Pending trial—Collection of funds for defence—Vituperation of judge and attacks upon witnesses—Privilege of members of Parliament.—The defendant had been committed for perjury by the judge, who tried an ejectment in which he was claimant, and in which the issue was the question of his identity with a certain baronet alleged by the defendants to be dead. The jury, during the defendant's case, had expressed themselves satisfied that the claimant was not the person he swore he was, and he elected to be nonsuited. The grand jury at the Central Criminal Court found true bills against him for perjury and forgery; the prosecution removed the indictments by *certiorari* into this court; and it had been fixed, upon application of the Attorney-General, that the trial should take place at bar next Easter term. The defendant and his friends, amongst whom were two members of Parliament and one barrister-at-law, had held public meetings for the purpose of obtaining money for the defence at the forthcoming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defence at the trial of the ejectment, and prejudice and partiality to the Lord Chief Justice of this court, who, they said, had proved himself unfit to preside at the trial of the indictments. They also asserted the innocence of the defendant, and the injustice of his treatment. Held, that the trial of these indictments was a proceeding of the court then pending; that, although the remarks at the meetings might be the subject of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation to deter the Lord Chief Justice from taking

any part in the trial, and also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantably interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court; and that it was the duty of the court to put a stop to them. The members of Parliament who made these remarks, when summoned to answer for contempt, apologised and submitted themselves to the court. They were, therefore, only fined 100*l.* each; but it was held that the court would not allow the privilege of the House of Commons to prevent punishment by imprisonment of its members for a contempt in the administration of justice, if the occasion required it. *Reg. v. Onslow and Whalley.* Q.B. 358.

Contempt.—It is a contempt of court, while a criminal charge is pending, to impugn the honesty and impartiality of the judge by whom it is to be tried, or to attempt to obstruct the course of justice by exciting public prejudice against it. But it is not a contempt merely to solicit subscriptions for the defence of a defendant on a criminal charge. *Reg. v. Skipworth.* *Reg. v. De Castro.* Q.B. 371.

DEBTOR'S ACT.

(See BANKRUPTCY.)

DEPOSITIONS.

(See EVIDENCE.)

DYING DECLARATION.

(See EVIDENCE.)

EMBEZZLEMENT.

Embezzlement—Clerk and Servant—Traveller and collector.—The prisoner was employed as traveller to solicit orders, and collect the moneys due on the execution of the orders, and to pay over moneys on the evening of the day when collected, or the day following. The prisoner had no salary, but was paid by commission. The prisoner might

get orders when and where he pleased within his district. He was to be exclusively in the employ of the prosecutors, and to give the whole of his time—the whole of every day, to their service: Held, that the prisoner was a clerk and servant within the embezzlement clause, sect. 68 of 24 & 25 Vict. c. 96. *Reg v. Bailey.* Cr.Ap.Ct. 56.

Embezzlement—Receipt of the money.—A conductor of a tramway car was charged with embezzling 8s. It was proved that on a certain journey there were fifteen threepenny fares, and twenty-five twopenny fares, and the conductor was seen to give tickets to each fare and to receive money from each, but what sum did not appear. He made out a way bill for the journey debiting himself with only nine threepenny fares and sixteen twopenny fares. The mode of accounting was to deliver the way bills for each journey to a clerk, and to hand in all the money received during each day on the following morning. The prisoner's money should have been 8*l.* 1*s.* 9*d.* according to his way bills for the day, but he paid in only 8*l.* 0*s.* 8*d.*: Held, that there was sufficient evidence of the receipt of 7*s.* 11*d.* the total amount of fares of the particular journey, and of the embezzlement of 3*s.* part thereof. *Reg. v. King.* Cr.Ap.Ct. 73.

Embezzlement—Charging a gross sum in indictment—Evidence—24 & 25 Vict. c. 96, s. 71.—It was the duty of an agent and collector of a coal club to receive payments by small weekly instalments, and to send in weekly accounts on Tuesdays, and each Tuesday to pay the gross amount received into the bank to the credit of the club. An indictment charged the agent with embezzling 1*l.* 1*s.*, and evidence was given that during a certain week payments of ten smaller sums, making together 1*l.* 1*s.*, had been made to the agent, and that the prisoner failed to account for those sums, or for any specific sum of 1*l.* 1*s.* There were two other counts containing charges of embezzlement of two other sums of 1*l.* 7*s.* and 1*l.* 5*s.*, and supported by similar evidence: Held, that the indictment might properly charge the embezzlement of a gross sum, and be proved by evidence similar to the above, and that it was not necessary to charge the embezzlement of each particular sum composing the gross sum; and that, although the evidence might show a large number of small sums embezzled, the prosecution was not to be

confined to the proof of three of such small sums only. *Reg. v. Balls.* Cr.Ap.Ct. 96.

Embezzlement—Clerk or servant.—A person engaged to solicit orders and paid by commission on the sums received, which sums he was forthwith to hand over to the prosecutors, and was at liberty to apply for orders when he thought most convenient, and was not to employ himself for any persons. Held, not a clerk or servant within 24 & 25 Vict. c. 96, s. 68 (embezzlement). *Reg. v. Negus.* Cr.Ap.Ct. 492.

Embezzlement—Servant—Receipt of money as such—24 & 25 Vict. c. 96, s. 68.—Prisoner was employed by B. to navigate a barge, and was entitled to half the earnings after deducting the expenses. His whole time was to be at S.'s service, and his duty was to account to S. on his return after every voyage. In October prisoner was sent with a barge load of bricks to L., and was there forbidden by S. to take back manure for P. Notwithstanding this prisoner took the manure and received 4*l.* for the freight, and appropriated it to his own use. It was not proved that he professed to carry the manure or receive the freight for his master, and the servant who paid the 4*l.* said that it was for the carriage of the manure, but he did not know for whom it was paid. Held, that the prisoner could not be convicted of embezzlement, as the money was not received in the name, or for, or on account of his master. *Reg. v. Cullum.* Cr.Ap.Ct. 469.

EVIDENCE.

REGISTER OF BIRTHS.

Evidence—Register of birth—Certified copy—14 & 15 Vict. c. 99, s. 14.—An instrument certified to be a copy of an entry in a district Register Book of Births, and to be signed by the officer in whose custody the Register Book is stated therein to be, is admissible in evidence on its mere production under the 14 & 15 Vict. c. 99, s. 14. *Reg. v. Weaver.* Cr.Ap.Ct. 527.

CONFESSION.

Evidence—Confession to a person in authority.—A female prisoner, in custody on a charge of murder, desiring to go to a water-closet, was sent there by the police with a woman who was impliedly authorised to prevent her escape. When alone together in the closet,

the woman, an acquaintance of the prisoner, alluding to the crime, said: "How came you to do it?" whereupon the prisoner made a statement in the nature of a confession: Held, that the statement was not induced by any hope or fear caused by a person in authority, and was, therefore, admissible in evidence against the prisoner. *Reg. v. Vernon. Cleasby, B. 153.*

Admission by a prisoner—Letter written by him and not sent to its destination rejected.—The prisoner was taken into custody for stealing from a dwelling-house, and when in the police station wrote two letters, one to his wife and the other to a friend. The prisoner was told that all letters would be read before being despatched, and the letter in question was detained, and a copy sent to its destination: Held, per Kelly, C.B., that the original addressed to the prisoner's wife was not admissible. *Reg. v. Pamenter. Kelly, C.B. 177.*

Evidence—Confession—Inducement—Admissibility.—Two little boys were in custody on suspicion of obstructing a railway train, and the mother and a policeman were also present. One of the boys' mothers said "You had better, as good boys, tell the truth." Whereupon both the boys confessed. Upon the trial, they were convicted upon evidence of that confession: Held, that the evidence of confession was rightly received. *Reg. v. Reeve and Another. Cr.Ap.Ct. 179.*

Evidence—Admission of prisoner—Inducement.—The words "I must know more about it," said by a police-constable to a prisoner in the course of a conversation between them respecting the subject matter of the charge, immediately before apprehension, are not a sufficient inducement to exclude an admission: Duties of a police officer as to questioning a prisoner. *Reg. v. Sarah Reason. Keating, J. 228.*

Evidence—Confession—Admissibility—Inducement.—Prosecutrix lost her purse, containing 1*l.* 4*s.*, in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen any one pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman, a short time after, went in search of prisoner, and having found him, told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, "Now is the time for you to take it

back to her." He denied having it, and went with the policeman. As they walked along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about 600 yards, some conversation took place, and the prisoner was searched, and on a half sovereign being found, prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, "Now is the time to take it back to her" and the prisoner's statement, "that he would make it all up to her": Held, that there was no inducement held out to the prisoner, and that his statement or confession that he would make it all up to her was admissible in evidence against him. *Reg. v. William Jones. Cr.Ap.Ct. 241.*

DYING DECLARATIONS.

Evidence—Dying declaration—Previous statement assented to by deceased when dying.—A statement made by deceased, under circumstances which would not render it admissible as a dying declaration, becomes admissible if repeated in his presence and at his request by the person to whom it was previously made, and if assented to by deceased (presuming that he is then in such a state that if he had made a statement it would have been admissible as a dying declaration.) *Reg. v. Steele. Lush, J. 168.*

HUSBAND AND WIFE.

Evidence—Husband and wife—Admissibility of wife as witness for a joint prisoner.—The wife of a prisoner jointly indicted and given in charge to the jury with other prisoners cannot be called as a witness by one of the other prisoners whilst the husband is so in charge with them. *Reg. v. Thompson and Others. Cr.Ap.Ct. 202.*

Feme covert—Crime committed by—Coercion.—The doctrine of coercion, as applicable to a crime committed by a married woman in the presence of her husband, only raises a disputable presumption of law in her favour, which is in all cases capable of being rebutted by the evidence. This disputable presumption of law exists in misdemeanors, as well as in felonies, and the question for the jury is the same in both cases. The doctrine in question applies to the crime of robbery with violence. *Semble:* Where a man and woman are indicted together for a joint crime, and it appears from the evidence for

the prosecution that they had lived together for some months as husband and wife, having with them an infant who passed as their child, it is not necessary for the woman to give evidence of her marriage in order to entitle her to the benefit of the doctrine of coercion, although the indictment does not describe her as a married woman. *Reg. v. Martha Torpey*. Russell Gurney, Recorder. 45.

WITNESS.

Evidence—Joint charge—Incompetency of fellow prisoners as witnesses for one another.—After several prisoners, jointly indicted, are given in charge to the jury one whilst in such charge cannot be called as a witness for another. The 14 & 15 Vict. c. 99, does not apply to criminal proceedings. *Reg. v. Payne*. Cr.Ap.Ct. 118.

Practice—Deposition—11 & 12 Vict. c. 42, s. 17—Same offence.—Where a prisoner is charged before a magistrate with obtaining money by false pretences, and afterwards indicted for uttering a forged promissory note, the charges arising out of one and the same transaction and being in fact identical, and the prisoner having had the opportunity of cross-examination before the magistrate: Held, that the deposition of a witness taken at such hearing, and who was afterwards unfit to travel to give evidence, was admissible and might be read at the trial for uttering the forged promissory note. *Reg. v. Jenkin Williams*. Smith, J. 101.

Evidence—Inability of witness to travel—Reception of deposition—11 & 12 Vict. c. 42, s. 17.—The depositions of a witness properly taken before the committing magistrate, with full opportunity of cross examination by the accused, was allowed to be read at the trial under the following circumstances, in the absence of the witness, who was alive, and who was living not far from the court where the prisoner was being tried. It was proved by a medical man that the witness was seventy-four years old, and that he thought that she would faint at the idea of coming into court, and that seeing so many faces would be dangerous to her, and that she was so nervous that it might be dangerous to her to be examined at all, but that he thought she could go to London to see a doctor without difficulty or danger: Held, that her deposition ought not to have been received under the 11 & 15 Vict. c. 42, s. 17. *Reg. v. Farrell*. Cr.Ap.Ct. 605.

Depositions on oath of a prisoner—Admissibility in evidence—Criminating questions—Ignorantia juris—Caution to witness—11 & 12 Vict. c. 42, s. 18.—By an Act of the Quebec Legislature, certain officers called "Fire Marshalls" are appointed with power to inquire into the origin of fires in Quebec and Montreal, and for that purpose to examine persons on oath. Upon an inquiry, held in pursuance of this statute, as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse, and his depositions made at the inquiry before the Fire Marshalls were admitted as evidence against him. Held (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada), that the depositions were properly admitted. The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "*Nemo tenetur seipsum accusare*," but does not apply to answers given without objection, which are to be deemed voluntary. The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed: ("*Ignorantia juris non excusat*."). The statute (11 & 12 Vict. c. 42, s. 18), requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them. *Reg. v. Coote*. Priv. Coun. 557.

Evidence—Examination of trader under a liquidation—Admissibility—32 & 33 Vict. c. 71, ss. 96, 97.—A summons to examine a petitioner whose affairs were under liquidation by arrangement having issued under sect. 96 of 32 & 33 Vict. c. 71, and he having appeared thereto and been examined, his examination is admissible in evidence on a criminal charge against him, whether the summons was regularly issued or not. *Reg. v. Widdup*. Cr.Ap.Ct. 251.

Railway company Common carriers—Loss of goods above 10l. in value—Goods not declared

under sect. 1 of Carriers' Act—Felonious acts of company's servants—What sufficient evidence of in civil action—Difference in that respect in a criminal prosecution—Calling the suspected servant as witness—Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), sect. 8.—In an action against a railway company, as carriers for hire, for the loss of goods alleged to have arisen from the felonious act of the servants of the company, it is not necessary for the plaintiff, in order to prove the felony, under sect. 8 of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), to bring home the charge to any individual servant of the company in particular, or to produce such evidence of the fact as would be requisite on a criminal trial; it being sufficient for him to show it to be more probable that the felony was committed by some one or more of such servants than by anyone else; and the mere fact of the company's abstaining from calling the suspected servants as witnesses, in answer to the plaintiff's case, is sufficient to justify the case being left to the jury. So held by the Court of Exchequer (Kelly, C.B., Pigott and Amphlett, BB.). *Vaughton and another v. the London and North-Western Railway Company.* Ex. 580.

EXTRADITION.

Extradition—Prisoner convicted in France—Surrender to authorities under Extradition Act, 1870 (33 & 34 Vict. c. 52).—The applicant, who had been an avoué in France, was now a prisoner in Jersey. He had been convicted *par contumace*, by the Cour d'Assise de Côtes du Nord, of three offences, *abus de confiance*, or breach of trust, fraudulent bankruptcy, and forgery. The first of these three offences is not one for which a surrender is stipulated by the French treaty of 1843, or by the statute confirming it, viz., 6 & 7 Vict. c. 75, and there has been no extradition treaty with France since. By 33 & 34 Vict. c. 52, s. 3, sub-sect. 2, a fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." By sect. 4, "an order in council for applying this Act in the case of any foreign state shall not be made unless

the arrangement. . . (2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act. By sect. 27, 6 & 7 Vict. c. 75, amongst other Acts, is repealed, "and this Act (with the exception or anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act), in the case of the foreign states with which those treaties are made, in the same manner as if an order in council referring to such treaties has been made, in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." Affidavits concerning the French law were produced by both sides. Upon a rule for a habeas corpus directing the Governor of Jersey Prison to produce the applicant, the court expressed doubts as to the exemption of old treaties from the restrictions of the Act of 1870. They held, however, that the French law, although the affidavits were contradictory, carried out the restriction provided for. *Ex parte Bouvier.* Q.B. 303.

Extradition Act—33 & 34 Vict. c. 52—Duty of police magistrate—His decision not reviewable—Deposition of a witness examined at a former hearing before a different police magistrate.—By the 33 & 34 Vict. c. 52 (The Extradition Act), when a fugitive criminal is brought before a police magistrate, the latter is to hear the case in the same manner and to have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England: Held, upon a rule for a habeas corpus, upon a committal by a police magistrate, that as this is not a court of appeal in such a case it will not question the judgment of the magistrates if the case was within his jurisdiction and there was any evidence to support his decision. Upon such a hearing, a witness gave his evidence before a police magistrate in the presence of the accused, and signed his deposition. The further hearing of the case was then adjourned, and on the adjournment day the further hearing was resumed before B., another police magistrate, but as the witness before examined before A. refused to attend and had gone abroad, his deposition made before A. was proved to have been duly taken, and was read as part of the case against the accused, whereupon, additional evidence

having been taken, the prisoner was committed to the Middlesex House of Detention pursuant to the Act: Held, per Martin and Pollock, BB. (Kelly, C. B., *dubitante*), that the deposition so taken at the former hearing by A. was properly receivable by B. upon the subsequent hearing. *Ex parte Huguet*. Ex. 551.

Extradition—Habeas Corpus Act (31 Car. 2, c. 2), s. 6—*Hong Kong Ordinance, No. 2, of 1850*—"Crime or offence against the laws of China."—By an ordinance of Hong Kong (No. 2 of 1850) it is enacted that magistrates may issue warrants for the apprehension of Chinese subjects in the colony charged with "any crime or offence against the laws of China," and the magistrate may, on ascertaining probable cause for the charge, commit such persons until the gaoler shall receive orders from the Governor relative to further detention, or to transmission of such persons to the Chinese authorities: Held (affirming the judgment of the Supreme Court, Hong Kong): (1) That the words "crime or offence" in the above ordinance must be confined to those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China: (2) that murder by a subject of China of a person not a subject of China, committed outside Chinese territory, was not a crime against the laws of China within the meaning of the ordinance: (3) that, there being sufficient *prima facie* evidence before the magistrate that the respondent had committed an act of piracy *jure gentium* to justify his committal for trial, it was the duty of the magistrate to have committed him for trial at Hong Kong; and that a warrant by which the magistrate authorised the Governor, if he thought fit, to deliver the respondent to the Chinese authorities, was illegal, and beyond the jurisdiction of the magistrate. The respondent, under a writ of *habeas corpus*, was ordered by the Superior Court of Hong Kong to be released from custody, on the ground that he was detained under an illegal warrant on a charge of piracy and murder. He was again arrested on a charge of piracy *jure gentium*, and was again discharged by the said court under a writ of *habeas corpus*: Held (reversing the judgment of the Supreme Court, Hong Kong), that a second arrest was not a violation of sect. 6 of the Habeas Corpus Act: (31 Car. 2, c. 2.) *Attorney-General of Hong Kong v. Kwok-a-Sing*. Privy Council. 565.

FALSE PRETENCES.

False pretences—Divisibility—Evidence.—The prisoner was convicted on an indictment charging that he did falsely pretend that he then lived at, and was landlord of, a beerhouse, and thereby obtained goods. The evidence was, that prisoner said he was the nephew of a man in prosecutor's employ, which was true; and that he lived at the beerhouse; but he did not say he was the landlord of that house. Prosecutor, in parting with his goods, was influenced both by the fact of his being the nephew of his servant, and the statement that he lived at the beerhouse; he believed him to be the landlord of the beerhouse: Held, that it was immaterial that the prosecutor was partly influenced by the fact that the prisoner was the nephew of his servant: Held, also, that the allegation that the prisoner lived at and was landlord of the beerhouse was divisible, and that the part, "that he lived at the beerhouse," being false, he was rightly convicted. *Reg. v. Lince*. Cr.Cas.Res. 451.

False pretences—Larceny—Second indictment for same offence—Distinction between a false pretence and larceny by trick.—The prisoner was indicted for feloniously stealing a dress, a shawl, and other articles of wearing apparel. The evidence was that the prisoner, who had a wife living, but who represented himself as a widower, was paying his addresses to the prosecutrix, who was a widow; that in the course of conversation he told her that his late wife's father had just died (which was true), that his sister-in-law was unable to go to the funeral, being too poor to purchase mourning; that thereupon the prosecutrix, without request or suggestion from him, offered to lend her clothes for the purpose, and placing the articles in question in a bag gave them to the prisoner to take to his sister-in-law. Some of these articles of dress were worn by the prisoner's wife at the funeral, others were found to have been pawned by a woman not identified, who gave her name as that of the prisoner's wife. The prosecutrix afterwards made repeated requests to the prisoner to return the clothing she had lent to his sister-in-law, but could not obtain them. It appeared that the prisoner's wife had two sisters. One of them only was called for the prosecution to prove that the clothing had not been given to her by the prisoner. It was contended for the prosecution that this was larceny by a bailee. The prosecutrix had given the clothes to the

prisoner to deliver them to his sister-in-law, but instead of doing so he had converted them to his own use: Held, that there was no case for the jury, inasmuch as, there being two sisters-in-law, there was no evidence that the prisoner had not delivered the clothes to a sister-in-law, in pursuance of the terms of the bailment, and also that there was no evidence of conversion to his own use, it not being proved that the clothes were pawned by the prisoner, but by a woman who might have been his sister-in-law who was not called to prove the non-receipt of the clothes by her. The prisoner was then indicted for the misdemeanor of obtaining the same articles of clothing by falsely pretending, *inter alia*, that his sister-in-law was poor and unable to buy mourning wherewith to attend the funeral of her father. An objection was taken on behalf of the prisoner that inasmuch as the possession only, and not the property had been passed or intended to be passed by the prosecutrix, the offence, if any, was larceny, and not false pretences. So held. It was then contended for the prosecution that by sect. 88 of 24 & 25 Vict. c. 96, it had been expressly enacted that the defendant may be convicted, although it appear at the trial that the offence amounts to larceny and not merely to obtaining money, &c., by false pretences, and therefore that if the jury should be of opinion that the property was obtained by a trick with intent to steal, it would amount to a larceny in law, and the prisoner might be convicted under this indictment by virtue of this provision of the statute. For the prisoner it was contended, that having been acquitted upon the same evidence on a charge of larceny for stealing these very articles, it would be contrary to the spirit of the law if he could be convicted of the same larceny under the form of an indictment for false pretences. The whole case was left to the jury, the judge intimating his concurrence with the views advanced on behalf of the prisoner, and stating that, if necessary, he should reserve the question for the Court of Criminal Appeal. The distinction between a false pretence and larceny by a trick. *Reg. v. Radcliffe*. Mr. Serjt. Cox. 474.

False pretences—What amount to—False statement of fact.—The prisoner induced the prosecutor to buy a chain by knowingly and falsely asserting (*inter alia*), "it is 15-carat fine gold, and you will find it stamped on every link." In point of fact, it was little more than 6-carat gold: Held, that the above assertion was sufficient evidence of

the false representation of a definite matter of fact to support a conviction for false pretences. *Reg. v. Ardley*. Brett, J. 23.

Indictment—False pretences—Receiving—Aider by verdict—24 & 25 Vict. c. 96, ss. 88, 95—7 & 8 Geo. 4, c. 64, s. 21.—An indictment under 24 & 55 Vict. c. 96, s. 95, charged that defendant "unlawfully did receive goods which had been unlawfully and knowingly, and fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud, as in this count before mentioned," but omitting to set out what the particular false pretences were: Held, that the objection, not having been taken before plea, was cured by the verdict of guilty. *Reg. v. Rebecca Goldsmith*. Cr.Ap.Ct. 479.

False pretence—Evidence—Guilty knowledge.—Prisoner was indicted for an attempt to obtain money from W., a pawnbroker, by false pretence (*inter alia*) that a ring was a diamond ring; and also for an attempt to obtain money from D. another pawnbroker by a similar false pretence. To show guilty knowledge, evidence that he had shortly before offered other false articles of jewellery to other pawnbrokers was held to be properly admissible. *Reg. v. C. F. Francis*. Cr.Ap.Ct. 612.

False pretence—Remoteness of the pretence—Evidence.—An indictment for false pretences charged that the defendant falsely pretended that he had a lot of trucks of coal at a railway station on demurrage, and that he required forty coal bags. The evidence was that defendant saw prosecutor and gave him his card, "J. W. and Co., timber and coal merchants," &c., and said that he was largely in the coal and timber way, and inspected some coal bags but objected to the price. The next day he called again, showed prosecutor a lot of correspondence, and said that he had a lot of trucks of coal at the railway station under demurrage, and that he wanted some coal bags immediately. Prosecutor had only forty bags ready, and it was arranged that defendant was to have them, and pay for them in a week. They were delivered to defendant, and prosecutor said he let the defendant have the bags in consequence of his having the trucks of coals under demurrage at the station. There was evidence as to the defendant having taken premises, and doing a small business in coal, but he had no trucks of coal on demurrage at the

station. The jury convicted the prisoner, and on questions reserved this court held that the false pretence charged was not too remote to support the indictment, and that the evidence was sufficient to sustain it. *Reg. v. Willot.* Cr.Ap.Ct. 68.

False pretences and conspiracy.—Evidence.—

S. and H. were jointly indicted on counts for false pretences, and a general count for conspiracy. S. was convicted on the counts for false pretences, and both on the count for conspiracy. The evidence was, that they were ostensibly carrying on business as publishers under the name of H., and Co., and that Hitchman was the author of a book published by them. To force the sale of the book, S. procured M. to write letters, purporting to come from a titled lady, ordering a copy of the book, and to address them to country booksellers. These letters were delivered by M. to S., and found their way by post to different country booksellers, and inclosed with them was a printed circular from the firm, offering reduced terms for an order of seven copies or more. At the trial, two witnesses produced a number of such letters, some of which had been given to them by booksellers (others than those named in the indictment) who received them, and some came to them from booksellers by post. There were no counts in the indictment alleging any intent to defraud by false pretences these particular booksellers, but the count for conspiracy charged generally a conspiracy to defraud A. B. and others. It was also proved that H., after the frauds charged, had represented himself as H. and Co.: Held, that the letters were admissible in evidence, without calling the booksellers who actually received them. Held, also, that evidence of attempts to defraud other booksellers than those named in the indictment was admissible under the count for conspiracy. Held, also, that the representations of H., after the frauds charged, were admissible in evidence. *Reg. v. Stenson and Hitchman.* Cr.Ap.Ct. 111.

False pretences—Indictment—Omission of words “with intent to defraud”—Amendment.—

Where in an indictment for false pretences the words “with intent to defraud” are omitted, the indictment is bad and cannot be amended under the 14 & 15 Vict. c. 100, s. 1. *Reg. v. James and another.* Lush, J. 127.

False pretences—Evidence—Effect of pretences.—

—On an indictment for inducing the prosecutor, by means of false pretences, to enter

into an agreement to take a field for the purpose of brick making, in the belief that the soil of the field was fit to make bricks, whereas it was not, he, being himself a brick maker, and having inspected the field and examined the soil: Held that, nevertheless, if he had been induced to take the field by false and fraudulent representations by the defendant of the specific matters of fact relating to the quality and character of the soil, as, for instance, that he had himself made good bricks therefrom, the indictment would be sustained: Held, also, that it would be sufficient if he was partly and materially, though not entirely, influenced by the false pretences. *Reg. v. English.* Cockburn, C. J. 171.

FORGERY.

*Forgery—I O U—Surety—24 & 25 Vict. c. 98, s. 23.—*The prisoner, being pressed by a creditor for the payment of 35*l.*, obtained further time by giving an I O U for 35*l.*, signed by himself, and also purporting to be signed by W. W.'s name was a forgery: Held, that the instrument was a security for the payment of money by W., and that the forgery of his name was a felony within the 24 & 25 Vict. c. 98, s. 23. *Reg. v. Chambers.* Cr.Ap.Ct. 109.

*Forgery—Promissory note—Secondary evidence of missing document.—*If the forged writing be not produced at the trial of the forger thereof, the best proof that can be given of the loss or destruction of the original instrument must be adduced before a copy may be used as secondary evidence. Therefore, where the only evidence of the loss of a forged note was that of the attorney for the prosecution, to whom it had been entrusted, and who swore that he had last seen it when he placed it in an old purse, which he afterwards laid by in his office as useless, and finally gave to his clerk; and that he had made thorough search and inquiry, but was unable to find the note, and believed it to have been burnt with the purse, by the clerk. Held, that the latter should have been called as a witness, and in the absence of his testimony, no sufficient proof of the loss or destruction of the note had been given to lay the foundation for the admission of secondary evidence of the instrument. *Reg. v. Hall.* Cleasby, B. 159.

*Forgery—Deed—Clergy—Letters of orders—24 & 25 Vict. c. 98, s. 20.—*The forging of

letters of orders issued by a bishop, certifying that on a day and at a place mentioned therein, A. B. was admitted into the holy order of deacons, according to the manner prescribed by the Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not the feloniously forging of a deed within the 24 & 25 Vict. c. 98, s. 20, although such forgery is a misdemeanor at common law. *Reg. v. A. H. Morton.* Cr.Ap.Ct. 456.

Forgery—Process of Court, 24 & 25 Vict. c. 98—Indictment—Allegation of “intent to defraud.”—24 & 25 Vict. c. 98, s. 28, enacts that “whosoever shall forge or fraudently alter any process of any Court” (with certain exceptions), “shall be guilty of felony:” Held, that an indictment for forgery under that section must allege an intent to defraud. Reg. v. John Powner. Quain, J. 235.

FINDING, LARCENY BY.

(See LARCENY.)

FORFEITURE FOR FELONY.

(See PRACTICE.)

HUSBAND AND WIFE.

(See EVIDENCE—PRACTICE.)

INDECENCY.

Indecency—Bathing near a public footway—Usage to bathe at such a place.—It is unlawful for men to bathe, without any screen or covering, so near to a public footway frequented by females that exposure of their persons must necessarily occur; and they who so bathe are liable to an indictment for indecency. Nor is it any defence to such an indictment that there has been, as long as living memory extends, an usage so to bathe at the place, and that there has been no exposure beyond what is necessarily incident to such bathing. Reg. v. Reed and others. Cockburn, C. J. 1.

INDECENT ASSAULT.

(See ASSAULT.)

INDICTMENT.

Second Indictment for same offence. 474.

False pretences and receiving—Order by verdict. 479.

Omission in, of words with intent to defraud, is false pretences. 127.

Allegation of intent to defraud in an indictment for forgery. 235.

Description of money in larceny. 257.

Description of corpus delicti. 589.

LARCENY.

BY AGENT OR ATTORNEY.

*Agent—Fraudulent conversion of money—Direction to apply same to a given purpose—24 & 25 Vict. c. 96, s. 75.—A stock and share dealer was in the habit of buying for S. gratuitously and receiving cheques on account. On the 27th of November he wrote informing S. that 300*l.* Japanese bonds had been offered to him in one lot, and that he had secured them for her, and that he had no doubt of her ratifying what he had done, and inclosing her a sold note for 336*l.*, signed in his own name. S. wrote in reply “that she had received the contract note for Japan shares and had inclosed a cheque for 336*l.* in payment, and that she was perfectly satisfied that he had purchased the shares for her.” In fact, the bonds had not been offered to the dealer in one lot, but he had applied to a stock jobber and agreed to buy three at 112*l.* each, but never completed the purchase: Held, that S.’s letter was a sufficient written direction, within the meaning of 24 & 25 Vict. c. 96, s. 75, to apply the cheque to a particular purpose, viz., in payment for the bonds. *Reg. v. Christian.* Cr.Ap.Ct. 502.*

Misdemeanor—Fraudulent misappropriation of money by an attorney—24 & 25 Vict. c. 96, ss. 75, 76.—W. deposited title-deeds with D. as security for a loan; and requiring a further loan, the defendant, an attorney, obtained for W. a sum of money from T., and delivered to her a mortgage deed as security. There was no direction in writing to the defendant to apply the money to any purpose, and he was entrusted with the mortgage deed, with authority to hand it over to T., on receipt of the mortgage money, which was to be paid to D. and W.,

less costs of preparing the deed. The defendant fraudulently converted a substantial part of the money to his own use: Held, that as there was no direction in writing, and the mortgage deed was duly delivered to T., the defendant was not guilty of a misdemeanor within 24 & 25 Vict. c. 76. s. 75: Held, also, that he was not guilty of the misdemeanor, in sect. 76, of converting property entrusted to him for safe custody, with intent to defraud. *Reg. v. Thomas Cooper.* Cr.Ap.Ct. 610.

OF ANIMALS.

Larceny—Animals feræ naturæ.—Rabbits were netted, killed, and put in a place of deposit, viz., a ditch, on the land of the owner of the soil on which the rabbits were caught, and some three hours afterwards the poachers came to take them away, one of whom was captured by gamekeepers who had previously found the rabbits and lay in wait for the poachers: Held, that this did not amount to larceny. *Reg. v. Townley.* Cr.Ap.Ct. 59.

BY AVOWTERER.

Larceny by an avowterer—What constitutes—Direction to the jury.—The prisoner eloped with the prosecutor's wife, travelling in a cart which the wife took from her husband's yard. The prisoner sold the pony, cart, and harness, in the presence of the wife, who did not object to the sale and received the proceeds, which she retained after paying the prisoner a sovereign he had expended in obtaining lodging while they were living in a state of adultery: Held, that the presence of the woman did not alter the offence; that the fact that he had negotiated the sale and received part of the proceeds was sufficient; from the circumstances the prisoner must have known that the pony, cart, and harness were not the property of the woman; and that if the jury were of opinion he had that knowledge, they were bound to convict him. *Reg. v. Harrison.* Lush, J. 19.

Larceny by avowterer—Proof of taking.—When a wife absconds from the house of her husband with her avowterer, the latter cannot be convicted of stealing the husband's money missed on their departure, unless the avowterer be proved to have taken some active part either in carrying away or in spending the sum stolen. *Reg. v. William Taylor.* Lush, J. 627.

BY BAILEE.

Larceny—Servant—Bailee—24 & 25 Vict. c. 96, s. 3.—A traveller was entrusted with pieces of silk (about 95yds. each) to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any might have been sold, and the numbers, quantities, and prices of the silk sold. All goods not so accounted for remained in his hands, and were counted by his employers as stock. At the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold silk. He was paid by a commission. Within six months after four pieces of silk had been delivered to him, the prisoner rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use. Held, that he could be properly convicted of larceny as a bailee. *Reg. v. Richmond.* Cr.Ap.Ct. 495.

Larceny—Bailee.—The prisoner was frequently employed by the prosecutor to fetch coals from C. Before each journey the prosecutor made up to the prisoner 24l., out of which he was to pay for the coals, keep 23s. for himself, and if the price of the coal, with the 23s., did not amount to 24l., to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal, as he obtained it, with the money received from the prosecutor; and the prosecutor did not know but that he did so; but provided he was supplied with the coal, and not required to pay more than the proper price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th March the prisoner had a balance of 3l. in hand, and the prosecutor gave him 21l. to make up 24l. for the next journey. The prisoner did not then buy any coal, but fraudulently appropriated the money. Held, that a conviction of the prisoner for larceny of the 21l., as a bailee was right. *Reg. v. Aden.* Cr.Ap.Ct. 512.

Larceny—Bailee—Offence punishable summarily—13 Geo. 2, c. 3—24 & 25 Vict. c. 96, s. 3.—The prosecutors (boot and shoe manufacturers) gave out to their workmen leather and materials to be worked up, which were entered in the men's books and charged to their debit. The men might either take

them to their own homes to work up, or work them up upon the prosecutor's premises; but in the latter case they paid for the seats provided for them. When the work was done, they received a receipt for the delivery of the leather and materials, and payment for the work. If the leather and materials were not redelivered, they were required to be paid for. The prisoner Daynes was in the prosecutor's employ, and received materials for twelve pairs of boots; he did some work upon them, but instead of returning them, sold them to the prisoner Warner. These materials were entered in the prosecutor's books to Daynes' debit, but omitted by mistake to be entered in Daynes' book. Held, that Daynes could not be convicted of larceny as a bailee, under 24 & 25 Vict. c. 96, s. 3, as the offence of which he had been guilty was punishable summarily under 13 Geo. 2, c. 8. *Quære*, whether the transaction, as between the prosecutor and his men, did not amount to a sale of the leather and materials? *Reg. v. Daynes and Warner*. Cr.Ap.Ct. 514.

BY A FALSE PRETENCE.

Larceny of a cheque—Obtaining a cheque by false pretences—Evidence.—A cheque is the subject of larceny if obtained *animo furandi*. What will constitute larceny of a cheque? Distinction between larceny and obtaining by false pretences. *The Commonwealth v. Yerkes*. Un.St.Ct. 208.

Larceny—False pretences—Master and servant.—The prisoner, a foreman, by fraudulently misrepresenting that 21*l.* 8*s.* was due for wages to the men under him, obtained that sum from his master's cashier. On the pay-sheet made out by the prisoner 1*l.* 10*s.* 4*d.* was set down as due to W., whereas only 1*l.* 8*s.* was due, and that amount only was paid by prisoner to W. out of the 21*l.* 18*s.*; the excess, 2*s.* 4*d.*, was appropriated, out of the 21*l.* 18*s.*, to the prisoner's own use, he intending so to appropriate it at the time he received the 21*l.* 18*s.*: Held, that the prisoner was guilty of larceny of the 2*s.* 4*d.* *Reg. v. Cooke*. Cr.Ap.Ct. 10.

BY FINDING.

Larceny—Lost bank note.—Prisoner received from his wife a 10*l.* Bank of England note, which she had found and passed it away. The note was indorsed "E. May" only, and the prisoner, when asked to put his name and address on it by the person to whom he passed it, wrote on it a false name and

address. When charged at the police station, the prisoner said he knew nothing about the note. The jury were directed that, if they were satisfied that the prisoner could, within a reasonable time, have found the owner, and if, instead of waiting, the prisoner immediately converted the note to his own use, intending to deprive the owner of it, it would be larceny. The prisoner was convicted: Held, that the jury ought to have been asked whether the prisoner, at the time he received the note, believed the owner could be found; and that the conviction was wrong. *Reg. v. Knight*. Cr.Ap.Ct. 102.

Larceny — Finding — Bailee.—The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on his, S.'s, marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them a long distance away as his own property to be kept for him. He then told S. that he had lost them, and denied all knowledge of them. The jury found (1) that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. (2) That at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently. (3) That the prisoner, when he sent them away, did so for the purpose and with the intention of depriving the owner of them and appropriating them to his own use: Held, that a conviction of larceny, or of larceny as bailee, could not be sustained under the above circumstances. *Reg. v. W. Brown Matthews*. Cr.Ap.Ct. 489.

INDICTMENT.

Larceny—Indictment—Description of money.—An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. 11*d.*, and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her 1*s.*, and refused to give her the 19*s.* change: Held that the prisoner could not be convicted upon this indictment of stealing 19*s.* *Reg. v. Elizabeth Bird*. Cr.Ap.Ct. 257.

Larceny—Indictment—Corpus delicti.—Prosecutor bought a horse, and was entitled to the return of 10s. chap money out of the purchase money. Prosecutor afterwards, on the same day, met the seller, the prisoner, and others together in company, and asked the seller for the 10s., but he said he had no change, and offered a sovereign to the prosecutor, who could not change it. The prosecutor asked whether anyone present could give change. The prisoner said he could, but would not give it to the seller of the horse, but would give it to the prosecutor, and produced two half-sovereigns. The prosecutor then offered a sovereign of his own with one hand to the prisoner, and held out the other hand for the change. The prisoner took the sovereign and put one half-sovereign only into the prosecutor's hand, and slipped the other into the hand of the seller, who refused to give it to the prosecutor and ran off with it. Held, that the indictment rightly charged the prisoner with stealing a sovereign. *Reg. v. Twist.* Cr.Ap.Ct. 589.

MISTAKE.

Larceny—Mistake.—B., making a purchase from the prisoner, gave him half-a-sovereign in mistake for a sixpence. Prisoner looked at it and said nothing, but put it into his pocket. Soon afterwards B. discovered the mistake, and returned and demanded the restoration of the half-sovereign. Prisoner said, "All right, my boy; I'll give it to you"—but he did not return it, and was taken into custody: Held, not to be a larceny. *Reg. v. Jacobs.* Cox, Serjt. 151.

Larceny—Parting with possession under mistake—Animus furandi.—A depositor in a post savings bank obtained a warrant for the withdrawal of 10s., and presented it with his depositor's book to a clerk at the post office, who, instead of referring to the letter of advice for 10s., referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed that sum upon the counter. The clerk entered 8*l.* 16*s.* 10*d.* as paid in the depositor's book, and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up, and found him guilty of larceny: Held, by a majority of the Judges, that he was properly convicted of larceny. *Reg. v. Middleton.* Cr.Ap.Ct. 260.

Larceny—Parting with possession of money under mistake—Animus furandi.—A depositor in a post office savings bank obtained a warrant for the withdrawal of 10s., and presented it with his depositor's book to a clerk at the post-office, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8*l.* 16*s.* 10*d.*, and placed that sum upon the counter. The clerk entered 8*l.* 16*s.* 10*d.* in the depositor's book as paid, and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up, and found him guilty of larceny: Held, by a majority of the Judges, that he was properly convicted of larceny. Per Cockburn, C.J., Blackburn, J., Mellor, J., Lush, J., Grove, J., Denman, J., and Archibald, J., that the clerk, and therefore the Postmaster-General, having intended that the property in the money should belong to the prisoner through mistake, the prisoner knowing of the mistake, and having the *animus furandi* at the time, was guilty of larceny. Per Bovill, C. J., Kelly, C.B., and Keating, J., that the clerk having only a limited authority under the letter of advice, had no power to part with the property in the money to the prisoner, and that therefore the conviction was right. Per Pigott, B., that, before possession of the money was parted with, and while it was on the counter, the prisoner had the *animus furandi*, and took it up, and was therefore guilty of larceny. Per Martin, B., Bramwell, B., Brett, J., and Cleasby, B., that the money was not taken *invito domino*, and therefore that there was no larceny. Per Bramwell, B., and Brett, J., that the authority of the clerk authorised the parting with the possession and property in the entire sum laid down on the counter. *Reg. v. Middleton.* Cr.Ap.Ct. 417.

BY A PARTNER.

Partner—Stealing goods of co-partnership—Indictment—31 & 32 Vict. c. 116, s. 6.—An indictment framed upon the 31 & 32 Vict. c. 116, s. 1, alleged that B. was a member of a co-partnership consisting of B. and L., and that B., then being a member of the same, eleven bags of cotton waste, the property of the said co-partnership, feloniously did steal, &c., contrary to the statute: Held, that the indictment was not bad for introducing the word "feloniously." *Reg. v. Butterworth.* Cr.Ap.Ct. 132.

PROPERTY.

Larceny—Property—Evidence.—Prisoner was charged with stealing a mare, the property of E. The evidence was that prosecutor, in presence of the prisoner, agreed to buy of W., a mare for 5*l.*, and that W. consented to take a cheque for the 5*l.* The prosecutor afterwards sent prisoner to W. with the cheque, and directions to take the mare to Bramshot Farm. On the next day prisoner sold a mare to S., which he said he had bought for 5*l.* When charged before the magistrate with stealing E.'s mare, he said he sold the mare to S. with the intention of giving the money to E., but that he got drunk: Held, that that was sufficient evidence on which a jury might find that the mare sold to S. was the property of E. *Reg. v. James King.* Cr.Ap.Ct. 134.

RECEIVING.

Larceny—Receiving.—The prisoner was indicted with others for stealing, and also for receiving from the other prisoners, knowing them to be stolen, four bags of rags. On his apprehension the prisoner was searched and in his pocket was found a letter addressed to him containing some references to the transaction, which letter was asserted by his council to be in the handwriting of his wife. It was objected that, if this letter was written by the prisoner's wife, its contents could not be read in evidence against him, inasmuch as a wife cannot be a witness against her husband. The contents of the letter were admitted, but with an intimation that a case would be reserved upon it. *Reg. v. Hilditch and Others.* Cox, Serjt. 131.

Larceny—Receiving—Accessory in the second degree.—An indictment charged S. with stealing 18*s.* 6*d.*, and C. with receiving the same. The facts were: S. was a barman at a refreshment bar, and C. went up to the bar, called for refreshments and put down a florin. S. served C., took up the florin, and took from his employer's till some money, and gave C. as his change 18*s.* 6*d.*, which C. put in his pocket and went away with it. On leaving the place he took some silver from his pocket and was counting it when he was arrested. On entering the bar signs of recognition took place between S. and C., and C. was present when S. took the money from the till. The jury convicted S. of stealing, and C. of receiving: Held, that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which C. might

have been convicted as a principal in the second degree; and that therefore the conviction of C. for receiving could not be sustained. *Reg. v. Coggins.* Cr.Ap.Ct. 517.

BY A TRICK.

Larceny—Goods obtained by trick—Credit.—Prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning: Held, that the conviction was right. *Reg. v. Slowly and Humphrey.* Cr.Ap.Ct. 269.

OF A WRIT.

Larceny of writ—County Court warrant—24 & 25 Vict. c. 96, s. 30.—A judgment debtor, whose goods had been levied upon, and were in possession of a County Court bailiff, under an execution, forcibly took the warrant from the bailiff and turned him out of possession, in the belief that it was the actual possession of the warrant alone which entitled the bailiff to remain in possession: Held, that such taking away of the warrant was for a fraudulent purpose, and a felony within the 24 & 25 Vict. c. 96, s. 30, but not a larceny. *Reg. v. Thomas Bailey.* Cr.Ap.Ct. 129.

LIBEL.

Libel—Pleading—Indictment—Innuendo.—An indictment which charged that the prisoner printed and published a libel of and concerning B. O., the prosecutor, according to the tenor and effect following, viz.: "B. O. of C. (meaning the said B. O.), Game and Rabbit Destroyer, and his wife (meaning Charlotte, the wife of the said B. O.), the seller of the same in country and town:" Held bad, for want of innuendoes, or averments showing that the words alleged to be defamatory charged an indictable offence, or had reference to the calling of the prosecutor. *Reg. v. James Yates.* Quain, J. 233.

Libel—Indictment for by a private prosecutor—Judgment for the defendant—Recovery of

his costs—6 & 7 Vict. c. 96, s. 8.—By the 8th section of the 6 & 7 Vict. c. 96 (Libel Act), if a private prosecutor proceeds by indictment for a libel, and the defendant is acquitted, such defendant may recover from the prosecutor his costs sustained by him by reason of such indictment to be taxed by the proper officer of the court before which it was tried: Held, that the proper and only mode of recovering such costs so taxed is by an action. *Richardson v. Willis*. Ex. 351.

Libel—Criminal information—Duty of relator to negative specific charge—General denial.—Where newspaper articles charged the relator with partiality from political motives, in the manner in which he discharged his duties as presiding officer at an election for members of a School Board, and mentioned a specific instance where he had rejected the vote of a duly qualified female voter, who was politically opposed to him, though the relator in his affidavit denied generally the truth of all the charges, and also denied that he refused any voter on political or improper or illegal considerations, or prevented directly or indirectly any voter, who was legally qualified to vote and who observed the prescribed regulations, from voting, or put any obstacles in the way, or did anything, at any time, calculated improperly to affect the election of any particular candidate. The court discharged a rule nisi for a criminal information which had been obtained against the publisher of the newspaper, because the relator had not negatived specifically the charge made against him as to the rejection of the female voter's vote. *Reg. (on the prosecution of J. C. Graves) v. Aunger*. Q. B. 407.

LUNATIC (CRIMINAL).

Lunatic—Power of judge of assize to issue a writ of habeas corpus—Depositions of deceased—"Full opportunity" by prisoner of examining deceased—Presumption of law as to what is full opportunity within 11 & 12 Vict. c. 42, s. 17.—Where a prisoner was committed for trial by the magistrates to the assizes, but, after committal, was removed by them to the County Lunatic Asylum, the judge of assize has power to issue a *habeas corpus* to bring the prisoner up for his trial. Where it is proved that the prisoner was present when the depositions of the deceased were taken, although the law will presume that, as he was present, he had a "full opportunity" within 11 &

12 Vict. c. 42, s. 17, evidence may nevertheless be offered to prove that he had not a "full opportunity" within sect. 17, so as to render the depositions inadmissible. *Reg. v. Peacock*. Brett, J. 21.

Criminal lunatic—Settlement to avoid forfeiture inoperative.—A person under a charge of felony previous to his trial conveyed all his real estate to his brother, reserving a life interest only, and assigned to his brother all his personal estate absolutely. He was acquitted of the charge on the ground of insanity. Held, that the settlements were inoperative on the ground of the lunacy of the settlor, because they were executed under a misapprehension, and because the event which they were framed to meet had not happened. *Manning v. Gill*. Bacon, V.C. 274.

Criminal lunatic—Maintenance by Guardians—Order of justices—3 & 4 Vict. c. 54, ss. 1 and 2.—The 3 & 4 Vict. c. 54, ss. 1 and 2, enacts that if any person imprisoned in any prison shall appear to be insane, it shall be lawful for one of Her Majesty's principal Secretaries of State to direct such person to be removed to a county lunatic asylum, or other proper receptacle for insane persons, until such person has become of sound mind, and has been certified to be so by two physicians or surgeons. Sect. 2 enacts that it shall be lawful for two justices of the peace to inquire into the place of last legal settlement of such insane person, and if it does not appear that he or she is possessed of any property which can be applied to his or her maintenance, they may direct the board of guardians to pay all reasonable charges for the weekly maintenance of such lunatic. The defendants had paid from the year 1855, a weekly sum of 16s. to the plaintiff for the maintenance of a criminal lunatic. On the 19th of October 1869, the defendants wrote to the plaintiff to say that they in future should pay no more than 11s. 1d. a week for the care of the lunatic. The plaintiff continued to keep the lunatic, and on the defendants still refusing to pay more than 11s. 1d. per week, brought his action to recover the difference. There was no evidence to prove that the plaintiff had ever procured a justices' order to be made on the guardians under the 2nd section of 3 & 4 Vict. c. 54: Held that it was competent for the guardians to agree to pay for the maintenance of the lunatic without an order of justices; that as the plaintiff could not get rid of the lunatic without an order of the Secretary of State, the defendants

could not determine the contract by a notice refusing to pay; also that the Court would infer from the fact of the guardians having paid 16s. a week for fifteen years, that they had agreed to pay 16s. a week as long as the lunatic remained in the asylum. *Pegge v. Guardians of the Lampeter Union*. C. P. 289.

Criminal lunatic—Maintenance — Power of justices to adjudge settlement of lunatic—
Order made by justices—"Debt, claim, or demand"—9 Geo. 4, c. 40, s. 54; 3 & 4 Vict. c. 54, s. 7; 22 & 23 Vict. c. 49, s. 1.—Where a person charged with felony has been acquitted on the ground of insanity, and is detained during pleasure, two justices of the county where the lunatic is detained may inquire into and adjudge the settlement of the lunatic, and may make an order upon the overseers or guardians of the parish where the lunatic is adjudged to be legally settled to pay such weekly sum for the maintenance of the lunatic as two justices shall from time to time direct. The service of such an order upon the guardians need not be accompanied by a statement of the grounds of chargeability and particulars of settlement. Proceedings to enforce the payment of each such weekly sum must be commenced within the time limited by sect. 1 of 22 & 23 Vict. c. 49. *Reg. v. Guardians of Stepney Union*. Q.B. 631.

Indictment—Malicious injury—Statement of the amount of damage done.—In an indictment under 24 & 25 Vict. c. 97, s. 51, for maliciously damaging personal property, the damage exceeding 5*l.*, it is not necessary to allege the value of each article injured, but only that the amount of the damage done to the several articles exceeded 5*l.* in the aggregate. *Reg. v. Thoman*. Cr.Ap.Ct. 54.

Malicious injury to property—Throwing a stone at a person but missing the person and breaking a window—24 & 25 Vict. c. 97, s. 51.—Defendant was indicted for unlawfully and maliciously committing damage upon a window in the house of the prosecutor contrary to the 23 & 24 Vict. c. 97, s. 51. Defendant, who had been fighting with other persons in the street after being turned out of a public house, went across the street, and picked up a stone, and threw at them. The stone missed them, passed over their heads, and broke a window in a public house. The jury found that he intended to hit one or more of the persons he had been fighting with, and did not intend to break

the window: Held that upon this finding the prisoner was not guilty of the charge within the above statute. To support a conviction under sect. 51 there must be a wilful and intentional doing of an unlawful act in relation to the property damaged. *Reg. v. Pembliton*. Cr.Ap.Ct. 607.

MANSLAUGHTER.

Manslaughter—Abandoned mine unfenced—
Duty of owner—23 & 24 Vict. c. 151, s. 21.—23 & 24 Vict. c. 151, which imposes on the owner of an abandoned mine the duty of securely fencing the same, does not apply to mines abandoned before the passing of the Act. *Reg. v. Gratrex*. Cleasby, B. 157.

Manslaughter—Medical Man—Negligence—
Evidence.—A medical man is bound to use proper skill and caution in dealing with a poisonous drug or dangerous instrument, and if he does not do so and death ensues he is guilty of manslaughter; *aliter* if it is want of skill arising from mere error of judgment. *Reg. v. Macleod*. Denman, J. 534.

Manslaughter—Neglect of duty—Gross negligence.—To render a person liable to conviction for manslaughter through neglect of duty, there must be such a degree of culpability in his conduct as to amount to gross negligence. *Reg. v. Robert Herbert Finney*. Lush, J. 628.

Manslaughter—Negligence—Pointing a gun.—One who points a gun at another person, without previously examining whether it be loaded or not, will, if the weapon should accidentally go off and kill him towards whom it is pointed, be guilty of manslaughter. *Reg. v. John Jones*. Lush, J. 628.

Manslaughter—Contributory negligence.—Contributory negligence is not an answer to a criminal charge, as to a civil action. *Reg. v. Kew and Jackson*. Byles, J. 355.

Manslaughter—Joint liability for acts of violence causing death—Common purpose.—If A. and B. agree together to assault C. with their fists, and C. receives a chance blow of the fists from either of them, both A. and B. are guilty of manslaughter. But should A., of his own impulse, kill C. with a weapon suddenly caught up, B. would not be responsible for the death, he being only liable for acts done in pursuance of the

common design of himself and A. *Reg. v. James Caton.* Lush, J. 624.

Manslaughter—Death through fright—Direct cause—Question for the jury.—Where A., in unlawfully assaulting B., who at that time had in her arms an infant, so frightened the infant that it had convulsions, although previously healthy, and from the effects of which it eventually died in about six weeks. A. is guilty of manslaughter, if the jury think that that the assault on B. was the direct cause of death. *Reg. v. Towers.* Denman, J. 530.

(See MURDER.)

MARRIAGE.

False entry in a marriage register.—Upon an indictment under 24 & 25 Vict. c. 98, s. 37, for making a false entry in a marriage register, it is not necessary that the entry should be made with intent to defraud, and it is no defence that the marriage solemnised was null and void, being bigamous. If a person knowing his name to be A. signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two. *Reg. v. Asplin.* Martin, B. 391.

MURDER.

Evidence—Statements of deceased—Res gestæ.—On the trial of a prisoner for the murder of his wife, a neighbour swore that a week before the alleged crime was committed the deceased visited her house, bringing an axe and carving knife, and gave them to her to take care of: Held, that the evidence of what was said by the deceased to the witness on handing her the instruments was admissible. *Reg. v. Christopher Edwards.* Quain, J. 230.

Murder—Evidence of motive—Admissibility of.—Expressions denoting a bad feeling toward deceased made use of some time before the crime is committed are admissible in evidence, but the jury must receive them with great caution. *Reg. v. Hagan.* Archibald, J. 357.

Murder—Poison—Intent—Evidence.—Where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers, and a

lodger in her house had died previous to the present charge from the same poison was held to be admissible. *Reg. v. Geering,* 18 L. J., M. C. 211, followed. *Reg. v. Cotton.* Archibald, J. 400.

Murder—Evidence of motive.—The prisoner was indicted for murder, and it was suggested by the prosecution that the motive of the prisoner was to get rid of the deceased, who was a witness against him for an assault for which he had been committed for trial, but acquitted, in consequence of the absence of the deceased. The depositions of the deceased taken upon the original charge of assault was tendered, in order to show that the deceased was a material witness: Held, that the deposition being taken prior to the passing of 11 & 12 Vict. c. 42, was not admissible. *Reg. v. Shippey.* Cockburn, C.J. 161.

Murder—Manslaughter—Resisting lawful apprehension.—If a prisoner, having been lawfully apprehended by a police-constable on a criminal charge, uses violence to the constable, or to anyone lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily injury, he is guilty of murder: And so, if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury, it would be manslaughter. *The Queen v. Porter.* Brett, J. 444.

Murder—Resistance of arrest under warrant for misdemeanor—Necessity for possession of the warrant by the officer.—In order to justify an arrest, even by an officer, under a warrant, for a mere misdemeanor, it is necessary that he should have the warrant with him at the time. Therefore, in a case where the officer, although he had seen the warrant, had it not with him at the time and it did not appear that the party knew of it: Held, that the arrest was not lawful. And, the person against whom the warrant was issued resisting his apprehension and killing the officer: Held, that it was not murder; and the prisoner was convicted of manslaughter only: *Reg. v. Chapman.* Hannen, J. 4.

Murder—Police officer acting on a void warrant—Manslaughter.—If the process under which a police officer arrests is so defective as to be an absolute nullity, or if the officer exceed his authority, the killing of him by the party arrested, if there be no malice, is manslaughter only, and not murder. *Rafferty v. The People.* Un.St.Ct. 617.

Murder—Evidence of other deaths.—Upon the trial of a prisoner for the murder of her infant by suffocation in bed: Held, that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which those children died. *Reg. v. Cotton* (12 Cox C.C. 400) followed and confirmed. *Reg. v. Harriet Roden.* Lush, J. 630.

Murder—Manslaughter—Provocation of words.—The general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter. But special circumstances attending such a provocation might be held to take the case out of the general rule. *Reg. v. Rothwell.* Blackburn, J. 145.

Murder—Illness of witness—11 & 12 Vict. c. 42, s. 17.—Upon the trial of the prisoner it was proposed to put in evidence the depositions of a witness absent through illness. The evidence that he was unable to travel was that of a medical man who last saw the witness on the Monday previous to the trial, which took place on Wednesday: Held, that this was not sufficient, and the deposition was rejected. *Reg. v. Bull.* Blackburn, J. 81.

NEGLIGENCE.

Neglect to provide child with proper food—Ability of parent to provide—Evidence—Indictment.—An indictment alleged in the first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child, she being able and having the means to do so. The second count charged that the prisoner unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so. The jury returned a verdict of guilty, on the ground that if the prisoner had applied to the guardians for relief she would have had it: Held, that neither count was proved, as it was not enough that the prisoner could have obtained the food on application to the guardians. *Quære*, whether the second count is good in law. *Reg. v. Rugg.* Cr.Ap.Ct. 16.

NOXIOUS THING.

(See ADMINISTRATION.)

PARTNER, LARCENY BY.

(See LARCENY.)

PARENT AND CHILD.

(See ABANDONMENT — ABDUCTION — NEGLIGENCE.)

PERJURY.

Perjury—Indictment—Evidence.—An indictment for perjury charged that prisoner swore on a plaint in the County Court for the price of coals obtained on credit at different times, in which it was a material question whether or not the prisoner had received any coals on credit from P., either on account of himself or A., “that he had never received any coals on credit from P., either on account of himself or A.”: Held, that the allegation in the indictment was not too general, although no specific instance was averred in which the prisoner had received coals on credit from P. At the trial the prisoner was asked three or four times by the advocate and judge whether he did at any time, either on his own account or that of A., have any coals on credit from P., to which the prisoner always answered, “I did not:” Held, that the prisoner’s attention was sufficiently called to the subject so as to found a charge of perjury upon the answer, although no distinct transactions on credit were suggested to him during his examination. *Reg. v. London.* Cr.Ap.Ct. 50.

Perjury—Indictment.—Upon an indictment for perjury committed before magistrates at petty sessions, upon a charge of stealing suet, the assignment was that the defendant falsely swore that he saw one Coates take the suet: Held, that as the indictment did not aver that Coates took the suet feloniously, it was bad. *Reg. v. Crawley.* Kelly, C.B. 162.

Perjury—Affiliation summons—Jurisdiction to hear—7 & 8 Vict. c. 101—8 & 9 Vict. c. 10.—The 7 & 8 Vict. c. 101, s. 2, in the case of an application by a woman before the birth of a bastard child against the putative father for a maintenance summons requires that “the woman shall make a deposition upon oath, stating who is the father of the child.” A summons having issued in such a case, the defendant appeared thereto,

made no objection to the summons, and was examined, and committed perjury: Held, that the magistrate had jurisdiction to hear the summons, the defendant by appearing having waived any objection thereto on the ground that there was no written deposition of the woman made upon the application for the summons. *Reg. v. Fletcher*. Cr.Ap.Ct. 77.

Perjury — Jurisdiction of Justices — Alehouse licence—Production of.—On trial for perjury alleged to have been committed before justices at the hearing of an information under the Beerhouse Licensing Acts against the keeper of such a house, his licence must be produced in order to show the jurisdiction of the justices and the materiality of the false evidence. *Reg. v. Mark Lewis*. Byles, J. 163.

Perjury—Deputy coroner — Jurisdiction — Inquisition—6 & 7 Vict. c. 83.—On the trial of an indictment for perjury committed at an inquest before the deputy coroner, evidence was given by the prosecution that the coroner, who was also a County Court registrar, was absent on his vacation, a vacation and air and exercise having been recommended by medical advisers for his health, which had become permanently impaired. It also appeared that the coroner, during his absence, spent three or four days every week in shooting, and that by far the greater number of inquests held in the district were held by the deputy coroner: Held, that it was a question for the judge, and not for the jury, whether the coroner was absent at the time for a lawful or reasonable cause, within 6 & 7 Vict. c. 83, s. 1: Held, also, that the inquisition was valid, and that the deputy coroner was lawfully acting at the time (sect. 2 of same statute). *Reg. v. John Johnson*. Cr.Ap.Ct. 264.

Perjury — Materiality — Relevancy to the legal charge.—On an indictment for perjury committed on the hearing of a charge of assault by a husband on his wife, an assignment of perjury in a statement by the prisoner, as a witness for the husband, that he had seen the wife committing adultery (of which he had told the husband), held bad for immateriality, as the supposed statement would not be legally relevant to the charge of assault as affording no ground of legal justification. *Reg. v. Tate*. Cockburn, C.J. 7.

Perjury—Materiality.—The prisoner was indicted for perjury committed by him on the

hearing of a summons, which he had taken out against the prosecutor before the justices at petty sessions, for using language calculated to incite him to commit a breach of the peace. The language used by the prosecutor was in consequence of the prisoner, as the prosecutor alleged, having kicked and struck a horse, and several witnesses were called who proved this. The prisoner's attention was then called to what the witnesses had said, and he was asked on cross-examination whether it was true; he, however, denied that he had ever kicked or struck the horse, and the justices thereupon committed him for trial for perjury: Held, that no perjury could be assigned, as the statement by the prisoner that he had never kicked or struck the horse was merely collateral. *Reg. v. Holden*. Mellor, J. 166.

Personation — Ballot Act, 35 & 36 Vict. c. 33, s. 24—Municipal election—Evidence—5 & 6 Will. 4, c. 76, s. 43.—It is not necessary to produce the charter of a city to prove that it is a municipal corporation; production of the minutes of the council at which the alderman was chosen for the ward is sufficient evidence, if it proves that the councillors of the ward were present on the occasion, and it is a sufficient compliance with sect. 43 of 5 & 6 Will. 4, c. 76. *Reg. v. Turner*. Lush, J. 313.

POLICE OFFICER.

(See ASSAULTS.)

PRACTICE.

COSTS.

Mandamus—Costs of prosecution—Statutory obligation of Lords of the Treasury.—By 7 Geo. 4, c. 64, ss. 22 & 23, an order for the payment of costs of prosecutions may be made by the courts before which they are tried. By sect. 24 the order for payment is to be made by the officer of the court upon the treasurer of the county, who is thereby authorised and required, upon sight of every such order, forthwith to pay the money in such order mentioned and shall be allowed the same in his accounts. By sect. 26 the justices at quarter sessions were to make regulations as to costs. By 14 & 15 Vict. c. 55, ss. 4 and 5, the power of quarter sessions to regulate costs of prosecutions was transferred to the Secretary

of State. By the Annual Appropriation Acts since 1835 there has been a grant of a gross sum each year for charges formerly paid out of county rates. By 29 & 30 Vict. c. 39, s. 14, when any sum shall have been granted to Her Majesty by an Act of Parliament to defray expenses for any specific public services, it shall be lawful for Her Majesty, from time to time, by her royal order, under the royal sign manual, countersigned by the Treasury, to authorise and require the Treasury to issue, out of the credits to be granted to them on the Exchequer accounts, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted. The accounts of costs of prosecutions in the county of Lancaster, after having been duly taxed by the proper officers, and paid out of the county rates, were re-taxed by officers of the Treasury, and part of them were disallowed. The justices of the county obtained a rule *nisi* for a mandamus to compel the Lords of the Treasury to pay the disallowed balance to the treasurer: Held, that the Lords of the Treasury had no right to tax these costs after they had been allowed by the proper officers; but that this court had no jurisdiction to issue a mandamus to compel the Lords of the Treasury to pay the balance. *Reg. v. The Lords of the Treasury; Ex parte The Justices of Lancashire.* Q.B. 277.

COUNSEL.

Summing up by counsel.—Where one of two prisoners jointly indicted is defended by counsel, and without claiming his right to sum up by the counsel for the prosecution, the undefended prisoner has addressed the jury, the counsel for the prosecution may not afterwards sum up the case to the jury as against the defended prisoner. *Reg. v. Madden and Hampton.* Cox, Serjt. 239.

FORFEITURES FOR FELONY.

Construction of Will—Class, when ascertained—Felon's share claimed by Crown.—Testator bequeathed to his son S. "the interest of 2000*l.*, to be paid him by my executor yearly so long as he lives, and then the principal to be divided amongst my real sons and daughters that are living, except my son that has the interest paid him." The will contained no residuary gift. The testator left S., and eight other children, who all predeceased S.: Held, that the class amongst whom upon the death of S. the

2000*l.* was to be divided, must be ascertained at the death of S., and that, the gift over failing, and there being an intestacy, the next of kin of the testator living at his death were entitled. R., one of the eight children, was convicted during the life of S. of felony, and died in prison. His interest under the will having been claimed by the Crown: Held, that the claim of the Crown could not be sustained. *Re Davis's Trusts.* Malins, V.C. 295.

Administration—Deceased wife a felon convict—Legacy accruing after her death—Notice to Queen's Proctor.—A married woman was convicted of felony and transported to Australia for seven years, where she was lost sight of, and nothing had been heard of her since 1843. In 1860 a legacy to which she was entitled under a will made in 1827 became payable, and the husband now moved for a grant of administration: Held, that the grant could not be made until a notice had been given to the Queen's Proctor. *In the Goods of Jemina Stevens.* Prob.Ct. 382.

Felon's Goods—Colonial Conviction—Forfeiture—Prerogative of Crown.—A person entitled to a legacy to be paid to him at twenty-one was, while under that age, convicted of felony in this country, and after attaining that age was again convicted of felony in New South Wales: Held, that the legacy would have been forfeited by the colonial convictions, had it not been already forfeited by the conviction in England. *Re Bateman's Trusts.* Bacon, V.C. 447.

Payment of costs of prosecution out of money found on prisoner—Prisoner adjudicated bankrupt before conviction—Right of Trustee in Bankruptcy to money found on prisoner—Act for Abolition of Forfeiture for Treason and Felony, 1870 (33 & 34 Vict. c. 23), s. 3—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 17.—After the conviction of a prisoner for felony the Central Criminal Court made an order, under sect. 3 of 33 & 34 Vict. c. 23, for the payment of the costs of the prosecution out of the moneys found on the prisoner at the time of his apprehension. The validity of this order being questioned by the trustee in bankruptcy of the prisoner's estate, on the ground that the prisoner had been adjudicated a bankrupt between the dates of his apprehension and conviction, and that on such adjudication all his property vested in the trustee: Held, that the order was rightly made, the trustee,

on adjudication of bankruptcy, taking the property of the bankrupt prisoner, subject to the possibility of the criminal court making the order in question. *Quære*, whether such an order would be valid if the prisoner were adjudicated bankrupt in respect of an act of bankruptcy committed before his apprehension. *Reg. v. Roberts*. Q.B. 574.

INDICTMENT.

Indictment—Amendment—Description of thing stolen—14 & 15 Vict. c. 100, s. 1.—An indictment charged the prisoner with stealing nineteen shillings and sixpence in money of the prosecutor. At the trial it was objected that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything, it was of stealing a sovereign. Thereupon the Court amended the indictment by striking out the words "nineteen shillings and sixpence," and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of stealing a sovereign: Held, that the Court had power so to amend under 14 & 15 Vict. c. 100, s. 1. *Reg. v. Gumble*. Cr.Ap.Ct. 248.

JUDGE.

A judge may, where the evidence is clear and uncontradicted, and the character of the witnesses unimpeached and unshaken, tell the jury in a criminal case that it is their duty to convict. *Commonwealth v. Magee*. Un.St.Ct. 549.

JURY.

Jurisdiction to allow jury to view the locus in quo—*Witnesses accompanying jury*—*Jury asking questions of witnesses during the view*—*Mistrial*—*Venire de novo*.—Upon the trial of an indictment for indecent exposure in an urinal, a Court of Quarter Sessions may allow the jury to have a view of the *locus in quo* after the summing up of the judge. But it is indiscreet to allow the witnesses to accompany the jury in the absence of the prisoner or his advocate, or the presiding judge. *Quære*, whether if the facts have been examined into by the Court, and are properly stated on record, the Court can order a *venire de novo* where the witnesses accompany the jury, and are asked by them to point out the precise spot where they stood and saw what they had stated they saw. But if the case sent up to the Court merely states that the Court below "has been informed" that the circumstances

specially set forth took place, this Court will not act upon such statement. *Reg. v. Martin and Webb*. Cr.Ap.Ct. 204.

Grand jury—Deposition of absent witness—Practice.—Upon a bill of indictment being presented, the Grand Jury made an application for the deposition of an absent witness: Held, per Byles, J., that they were entitled to peruse the deposition without formal proof that the witness was too ill to travel. *Reg. v. Bullard*. Byles, J. 353.

JURISDICTION.

Jurisdiction—Indictment at assizes for libel—Acquittal of defendant—Action by defendant against prosecutor for costs—Declaration alleging trial and acquittal—Plea, "Nul tiel record"—*Evidence—Certified copy of record of acquittal*—6 & 7 Vict. c. 96, s. 6—14 & 15 Vict. c. 99, s. 13.—1. An action brought in a Superior Court, under 6 & 7 Vict. c. 96, s. 8, to recover the costs sustained by the plaintiff upon the trial of an indictment for libel preferred against him at the assizes by the defendant, upon which trial a verdict of "Not guilty" was returned, and judgment was given for the plaintiff, who was duly discharged, is a "proceeding" in which, under sect. 13 of the Evidence Amendment Act (14 & 15 Vict. c. 99) a certified copy of the record of such trial and acquittal, under the hand of the proper officer of the court of assize, is admissible in evidence in proof of such trial and acquittal, in answer to a plea of "Nul tiel record." 2. The issue on a plea of "Nul tiel record" is triable by the Court, and not by a jury, and is proved by the production, in open court, of the record itself, or a duly certified copy of it. So held by the Court of Exchequer (Kelly, C.B., and Martin, Bramwell, and Channell, BB.). *Richardson v. Willis*. Ex. 298.

Indictment found at Quarter Sessions—Trial at the Assizes.—An indictment was found at the county sessions at Bedford against the defendant for obstructing a highway. Upon the certificate of such finding, the defendant was taken before a magistrate and bound by recognisance to appear and plead at the assizes. The indictment was not transmitted to the assizes, but was in the custody of the clerk of the peace: Held, that the judge of assize had no power to order the clerk of the peace to send the indictment to the assizes; that as it was found at the sessions, and not transmitted for trial at the assizes, the court had no jurisdiction

to try the same. But a second indictment for the same offence being found by the Grand Jury at the assizes: Held, that the defendant, being bound to appear by recognisance, must be called upon to plead to the second indictment. *Reg. v. Wildman. Keating, J.* 354.

Trial at bar—Removal by certiorari from Central Criminal Court—Indictment for perjury—Offences in two counties.—An indictment, containing two counts, one alleging perjury committed in Middlesex, the other alleging perjury committed in London, was tried, upon removal by *certiorari* from the Central Criminal Court, before the Queen's Bench sitting at bar. Held, that it was no valid objection to the jurisdiction of the court that the jury was entirely from the county of Middlesex. *Reg. v. Castro. Q.B.* 484.

Removal of Indictment into Queen's Bench by certiorari—Costs of prosecution—Whether necessary that prosecutor should be a "party grieved"—5 & 6 Will. & M. c. 11, s. 3—16 & 17 Vict. c. 30, s. 5.—Sect. 5 of 16 & 17 Vict. c. 30, after reciting that "it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench," enacts "that whenever any writ of *certiorari* to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognizance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment," &c. This enactment is general in its application, and renders it unnecessary that the prosecutor, in order to be entitled to the payment of his costs, should be the party "grieved or injured," as required by 5 & 6 Will. & M. c. 11, s. 3. *Reg. v. Oastler. Q.B.* 578.

RESTITUTION.

Restitution.—The court is bound by the statute to order restitution of property obtained by false pretences and the subject of the prosecution, in whose hands soever it is found. And so likewise of property received by a person knowing it to have been stolen or obtained by false pretences. But the order is strictly limited to property identified at the trial as being the subject of the charge. Therefore, it does not extend to property in the possession of innocent third persons

which was not produced and identified at the trial as being the subject of the indictment. *Reg. v. Goldsmith. Chambers, C.S.* 594.

Restitution.—An order of restitution of property stolen will extend only to such property as is produced and identified in the course of the trial, and not to all the articles named in the indictment, unless so produced and identified and in the possession of the court. *Reg. v. Smith. Cox, Serjt.* 597.

SENTENCE.

Penal servitude—Previous conviction—Sentence—Amendment—11 & 12 Vict. c. 78, s. 2; 27 & 28 Vict. c. 47, s. 2.—Upon an indictment for wounding with intent to do grievous bodily harm, which did not charge a previous conviction for felony, the prisoner was convicted and sentenced to seven years' penal servitude, the learned judge reserving for this Court the question whether he had power to sentence for a greater term than five years (27 & 28 Vict. c. 47, s. 2), the sentence to stand or be reduced to five years as this Court should determine: Held, that the sentence ought to be reduced to five years' penal servitude, and the sentence amended accordingly (11 & 12 Vict. c. 78, s. 2.) *Reg. v. Willis. Cr.Ap.Ct.* 192.

VEXATIOUS INDICTMENT.

The Vexatious Indictments Act (22 & 23 Vict. c. 17)—*Its amendment by 30 & 31 Vict. c. 35, s. 1*—*Misdemeanor under the Debtors' Act, 1869 (32 & 33 Vict. c. 62)*—*Quashing count of indictment.*—With reference to misdemeanors under the Debtors' Act, 1869, the provisions of the Vexatious Indictments Act must be considered as controlled by 30 & 31 Vict. c. 35, s. 1. In considering the sufficiency of a recognisance to prosecute under sect. 1 of the Vexatious Indictments Act, reference may be made to the accompanying depositions to ascertain the particulars of the offence to be charged. A count under the Debtors' Act, 1869, s. 13, sub-sect. 1, alleging simply that the defendant did obtain credit from the prosecutor "by means of fraud other than by false pretences," without setting out the means will be quashed as being too general. *Reg. v. George Bell. M. Smith, J.* 37.

WITNESS.

Practice—Illness of witness—Proof of deposi-

tion—Postponement of trial—Expenses of prosecution.—The deposition of a witness in a criminal prosecution who has travelled to the assize town, but is too ill to attend court for examination, may be read before the grand jury, after the illness of the witness and the due taking of the deposition has been proved to the satisfaction of the judge. It is not essential that the proof of the deposition having been duly taken should be given by the clerk to the committing magistrate. Upon the postponement of a trial for the recovery of a witness who is ill, the prosecutor may then be allowed the costs of the prosecution incurred up to the date of such postponement. *Reg. v. John Wilson and Ann Wilson.* Lush, J. 622.

(See CONTEMPT—INDICTMENT—MURDER.)

PRISON BREACH.

Arrest without warrant—Remand dismissal.—

W. was given into custody without a warrant on a charge of felony. He was conveyed before a magistrate, who remanded him in custody without any evidence on oath. W. was removed to a lock-up from which he escaped. The charge of felony made against him was dismissed by the magistrates: Held (per Martin, B.), that the dismissal by the magistrates was not equivalent to an acquittal by a jury, that the defendant was legally in custody, although no evidence was taken upon oath to justify his remand, and that these facts were no defence to the indictment for breaking prison. *Reg. v. Waters.* Martin, B. 390.

RAPE.

Attempt to commit a rape on a woman asleep—

Incapability to consent.—If a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape. *Reg. v. Mayers.* Lush, J. 311.

Rape—Consent—Idiot girl.—Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is, that if they are satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty. The two cases of *Reg. v. Fletcher* are not adverse to one another. The principle is properly laid down in the first case, and the second case was only a decision on the facts that there was not that requisite testimony of want of assent to justify leaving the case to the jury. *Reg. v. Robert Barrat.* Cr.Ap.Ct. 498.

Carnal knowledge of girl under twelve—Consent extorted.—On an indictment for carnal knowledge of a girl about ten years of age and under twelve, and also for an assault: Held, on the latter count, that, although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect. *Quære*, if such consent can be given in such a case by a child who is not *sui juris.* *Reg. v. Woodhurst.* Lush, J. 443.

(See ASSAULTS—INDECENT ASSAULTS.)

RECEIVING.

(See LARCENY.)

VEXATIOUS INDICTMENTS ACT.

(See PRACTICE.)

WITNESS.

(See EVIDENCE—MURDER.)

WOUNDING.

(See ASSAULT.)

APPENDIX

STATUTES.

Criminal Law Amendment (Violence, Threats, &c.) Act (34 & 35 Vict. c. 32).

An Act to amend the Criminal Law relating to Violence, Threats, and Molestation (29th June, 1871). 649.

Prevention of Crime Act (34 & 35 Vict. c. 112).

An Act for the more effectual Prevention of Crime (21st August, 1871). 652.

Municipal Corporations Evidence Act (36 & 37 Vict. c. 33).

An Act to facilitate the Proof of Byelaws and Proceedings of Municipal Corporations in England and Wales (7th July, 1873). 665.

Extradition Act, 1873 (36 & 37 Vict. c. 60).

An Act to amend the Extradition Act, 1870 (5th August, 1873). 666.

Middlesex Sessions Act (37 Vict. c. 7).

An Act to amend the Law respecting the Payment of the Assistant Judge of the Court of Sessions of the Peace for the

County of Middlesex, and his Deputy, and the Chairman of the Second Court at such Sessions (21st May, 1874). 669.

Courts (Colonial) Jurisdiction (37 & 38 Vict. c. 27).

An Act to regulate the Sentences imposed by Colonial Courts where jurisdiction to try is conferred by Imperial Acts (30th June, 1874). 671.

Personation Act (37 & 38 Vict. c. 36).

An Act to render Personation, with intent to deprive any Person of Real Estate or other Property, Felony (30th July, 1874). 672.

Courts (Straits) Settlement Act (37 & 38 Vict. c. 38).

An Act to extend the jurisdiction of Courts of the Colony of the Straits Settlements to certain Crimes and Offences committed out of the Colony (30th July, 1874). 673.

Prison Authorities Act (37 & 38 Vict. c. 47).

An Act to extend the Powers of Prison Authorities in relation to Industrial and Reformatory Schools, and for other purposes relating thereto (30th July, 1874). 673.

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